To: Konkus, John[konkus.john@epa.gov]; Bowman, Liz[Bowman.Liz@epa.gov]
Cc: Dalebout, William[Dalebout.William@epa.gov]; Grantham, Nancy[Grantham.Nancy@epa.gov]; Ortiz, Julia[Ortiz.Julia@epa.gov]
From: Orquina, Jessica
Sent: Wed 10/25/2017 8:39:59 PM
Subject: RE: EPA Releases Energy Independence Report

Great! We'll get them posted. Thank you!

Jess

Jessica Ann Orquina, Director

Office of Web Communications

U.S. Environmental Protection Agency

Email: orquina.jessica@epa.gov

Office: 202-564-0446

Mobile: 202-322-8369

From: Konkus, John
Sent: Wednesday, October 25, 2017 4:39 PM
To: Orquina, Jessica <Orquina.Jessica@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>
Cc: Dalebout, William <Dalebout.William@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>; Ortiz, Julia <Ortiz.Julia@epa.gov>
Subject: RE: EPA Releases Energy Independence Report

These are excellent.

From: Orquina, Jessica
Sent: Wednesday, October 25, 2017 4:38 PM
To: Konkus, John <konkus.john@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>
Cc: Dalebout, William <Dalebout.William@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>; Ortiz, Julia <Ortiz.Julia@epa.gov>

Subject: RE: EPA Releases Energy Independence Report

Hi, here are some posts for your review.

Thanks! Jess

FACEBOOK:

Our new report shows that we can be both pro-jobs and pro-environment. #EPAback2basics https://www.epa.gov/newsreleases/epa-releases-energy-independence-report

Learn how we're working to curb regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation while protecting human health and the environment. #EPAback2basics https://www.epa.gov/newsreleases/epa-releases-energy-independence-report

TWITTER:

Our new report shows that we can be both pro-jobs and pro-environment. https://www.epa.gov/newsreleases/epa-releases-energy-independence-report #EPAback2basics

We're curbing regulatory burdens that encumber economic & job growth while protecting health & the environment. https://www.epa.gov/newsreleases/epa-releases-energy-independence-report

Jessica Ann Orquina, Director

Office of Web Communications

U.S. Environmental Protection Agency

Email: orquina.jessica@epa.gov

Office: 202-564-0446

Mobile: 202-322-8369

From: Bowman, Liz
Sent: Wednesday, October 25, 2017 3:52 PM
To: Orquina, Jessica <Orquina.Jessica@epa.gov>; Konkus, John <konkus.john@epa.gov>
Cc: Grantham, Nancy <Grantham.Nancy@epa.gov>; Dalebout, William <Dalebout.William@epa.gov>
Subject: RE: EPA Releases Energy Independence Report

That would be great, thank you!

From: Orquina, Jessica
Sent: Wednesday, October 25, 2017 3:52 PM
To: Konkus, John <konkus.john@epa.gov>; Bowman, Liz <Bowman.Liz@epa.gov>
Cc: Grantham, Nancy <Grantham.Nancy@epa.gov>; Dalebout, William <Dalebout.William@epa.gov>
Subject: RE: EPA Releases Energy Independence Report

+ Liz

Let us know. We're happy to draft some posts for the main accounts if you want.

Jess

From: Konkus, John
Sent: Wednesday, October 25, 2017 3:51 PM
To: Orquina, Jessica <Orquina.Jessica@epa.gov>
Cc: Grantham, Nancy <Grantham.Nancy@epa.gov>; Dalebout, William <Dalebout.William@epa.gov>
Subject: RE: EPA Releases Energy Independence Report

Looping in Liz.

From: Orquina, Jessica
Sent: Wednesday, October 25, 2017 3:44 PM
To: Konkus, John <konkus.john@epa.gov>
Cc: Grantham, Nancy <Grantham.Nancy@epa.gov>; Dalebout, William <Dalebout.William@epa.gov>
Subject: FW: EPA Releases Energy Independence Report

John, do you want us to write a couple social media posts to promote this?

Jess

Jessica Ann Orquina, Director

Office of Web Communications

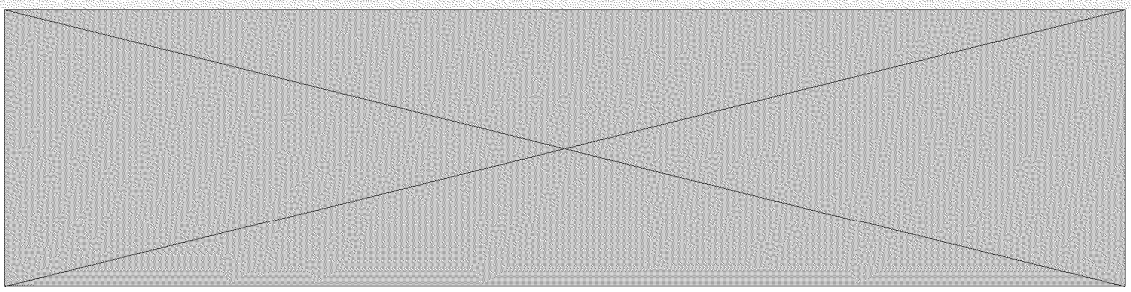
U.S. Environmental Protection Agency

Email: orquina.jessica@epa.gov

Office: 202-564-0446

Mobile: 202-322-8369

From: EPA Press Office [mailto:press=epa.gov@cmail19.com] **On Behalf Of** EPA Press Office
Sent: Wednesday, October 25, 2017 3:03 PM
To: Orquina, Jessica <Orquina.Jessica@epa.gov>
Subject: EPA Releases Energy Independence Report



EPA Releases Energy Independence Report

"We can be both pro-jobs and pro-environment," – EPA Administrator Scott Pruitt

WASHINGTON (October 25, 2017) - Today, the U.S. Environmental Protection Agency (EPA) released its final report on how EPA, under Administrator Scott Pruitt's leadership, is implementing President Trump's Executive Order 13783 to curb regulatory burdens in order to promote energy production and economic growth – while protecting human health and the environment.

"EPA is committed to President Trump's agenda," said EPA Administrator Scott Pruitt. "We can be both pro-jobs and pro-environment. At EPA, that means we are working to curb unnecessary and duplicative regulatory burdens that do not serve the American people – while continuing to partner with states, tribes and stakeholders to protect our air, land, and water."

EPA released its final report in accordance with President Donald Trump's Executive Order (EO) 13783. Notably, the report provides a look at how EPA is working to curb regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation while protecting human health and the environment. The report can be found online here.

The report discusses nine EPA actions on energy-related regulations covered by EO 13783. It further includes the following four initiatives EPA plans in undertaking to implement this order:

1. **New Source Review reform (NSR) –** EPA is establishing an NSR Reform Task Force to review and simplify the NSR application and permit process.

2. **National Ambient Air Quality Standards (NAAQS) reform –** EPA plans to use the newly formed Ozone Cooperative Compliance Task Force to review administrative options to meaningfully improve air quality as it relates to ozone. EPA will also work to streamline the approval of state air pollution plans, and eliminate EPA's backlog of state pollution plans.

3. **Robust Evaluations of the Employment Effects of EPA regulations** – Regulations impose high costs on American workers, particularly in the energy sector. Five environmental statutes state that EPA conduct continuing evaluations of potential shifts in employment that may result from implementation of these statutes. The Agency historically has not conducted these assessments. EPA intends to conduct these evaluations consistent with the statutes.

4. **Reestablishing the Smart Sectors Program** – EPA recently relaunched the Smart Sectors program to re-examine how it engages with American businesses to reduce unnecessary regulatory burdens, while protecting human health and the environment. (www.epa.gov/smartsectors).

Background

On March 28, 2017, President Trump signed Executive Order (EO) 13783 promoting clean and safe development of the United States' vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.

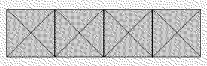
To that end, Section 2 of EO 13783 required an immediate review of all agency actions that potentially burden the safe, efficient development of domestic energy resources. Section 2 required the heads of agencies to review all existing regulations, orders, guidance documents, policies, and any other similar agency actions that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.

Section 2 also required agencies to submit a plan on how the agency will carry out the review. For those agencies that submitted a plan, the agency was required to submit a draft final report to OMB and EOP offices within 120 days (by July 26, 2017). The EOP offices provided recommendations to the agencies to ensure the final reports that reflect the policies laid out in EO 13783.

Final reports were to be finalized within 180 days (by September 24, 2017) unless the OMB Director, in consultation with the other EOP officials, extend the deadline.

To assist agencies in the development of the EO 13783 reports, OMB developed guidance on May 8, 2017 providing additional direction to agencies. OMB directed Agencies to provide a number of pieces of information in the agency final reports and to publish the final report on the agency website and in the Federal Register.

Visit The EPA's Newsroom



U.S. Environmental Protection Agency
1200 Pennsylvania Avenue Northwest
Washington, D.C. 20004

From: Bodine, Susan
Location: 3204WJC-South
Importance: Normal
Subject: NSR Memo, conference line, 1 **Ex. 6 - Personal Privacy**
Start Date/Time: Mon 12/11/2017 9:30:00 PM
End Date/Time: Mon 12/11/2017 10:00:00 PM

From: Wehrum, Bill
Location: WJC-N 5400 + Video with OAQPS + 1 Ex. 6 - Personal Privacy Participant Code: Ex. 6 - Personal Privacy
Importance: Normal
Subject: NSR Improvement
Start Date/Time: Thur 11/30/2017 4:00:00 PM
End Date/Time: Thur 11/30/2017 4:45:00 PM
Wehrum Meeting Request_NSR Improvement.docx

To: Wehrum, Bill; Harlow, David; Gunasekara, Mandy; Lewis, Josh; Page, Steve; Koerber, Mike; Harnett, Bill; Wood, Anna; Kornylak, Vera; Santiago, Juan; Wayland, Richard; Dunham, Sarah; Harvey, Reid; Krieger, Jackie; Vetter, Cheryl; Rao, Raj
Cc: Alston, Lala; Johnson, Yvonnew; Long, Pam

OAR Meeting Request Form
For Bill Wehrum

Date of this Request: 11/21/2017

Scheduling Point of Contact: Lala Alston 919-
Technical Point of Contact: Anna Wood 919- Ex. 6 - Personal Privacy

Subject: NSR Improvement

Purpose: To provide update and discuss potential actions that would be responsive to the permit streamlining and LEAN efforts.

- Next ADP Milestone: Decision Briefing
- If applicable, due date to: OP __/__/__ (_ days review); OMB: __/__/__ (days review); NA
- Legal deadline: Litigation Pending. N/A
- Other firm deadline:

First possible date for meeting: 11/29/2017
Last possible date for meeting: 12/1/2017
Duration: 45 minutes

Requested Audio / Video (*Mark with "X" if requested*)

_____ Video Location(s):
List video locations needed (e.g., RTP, DC, Regions)– HQ will set up a bridge if needed

____ HQ Conference Line:
If requested, HQ staff will provide in meeting invite

Invitees (please list by Office and in Outlook format, e.g. *Last, First*):
Please include the key OGC and/or Regional representatives as appropriate. Only key invitees are listed by office; others are Cc:

Office/Org	Name (*Last, First*)
OAR	Harlowe, David; Gunasekara, Mandy; Lewis, Josh
OAQPS	Page, Steve; Koerber, Mike; Harnett, Bill; Wood, Anna; Kornylak, Vera; Santiago, Juan; Wayland, Richard; Harnett, William
Schedulers to Cc:	Alston, Lala; Johnson, Yvonnew; Long, Pam

HQ Meeting Briefing Materials: Must provide to OAQPS IO by 5:00pm, 2 days before meeting

From: Bailey, Ethel
Location: 3204WJC-South
Importance: Normal
Subject: NSR Memo, conference line, 1 (Ex. 6 - Personal Privacy) code (Ex. 6 - Personal Privacy)
Start Date/Time: Mon 12/11/2017 5:15:00 PM
End Date/Time: Mon 12/11/2017 5:30:00 PM

From: Bailey, Ethel
Location: 3204WJC-South
Importance: Normal
Subject: NSR Memo, conference line, 1 (Ex. 6 - Personal Privacy) code (Ex. 6 - Personal Privacy)
Start Date/Time: Mon 12/11/2017 9:30:00 PM
End Date/Time: Mon 12/11/2017 10:15:00 PM

From: Bailey, Ethel
Location: 3204WJC-South
Importance: Normal
Subject: NSR Memo, conference line, 1 [Ex. 5 - Deliberative Process] code [Ex. 5 - Deliberative Process]
Start Date/Time: Mon 12/11/2017 9:30:00 PM
End Date/Time: Mon 12/11/2017 10:00:00 PM

From: Traylor, Patrick
Location: WJCS-3216
Importance: Normal
Subject: NSR Memorandum Discussion
Start Date/Time: Mon 12/4/2017 6:00:00 PM
End Date/Time: Mon 12/4/2017 7:00:00 PM

From: Loving, Shanita
Location: WJC-N 5400 + Video with OAQPS + Ex. 6 - Personal Privacy Participant Code: Ex. 6 - Personal Privacy
Importance: Normal
Subject: NSR Improvement
Start Date/Time: Thur 11/30/2017 4:00:00 PM
End Date/Time: Thur 11/30/2017 4:45:00 PM
Wehrum Meeting Request_NSR Improvement.docx

To: Wehrum, Bill; Harlow, David; Gunasekara, Mandy; Lewis, Josh; Page, Steve; Koerber, Mike; Harnett, Bill; Wood, Anna; Kornylak, Vera; Santiago, Juan; Wayland, Richard; Dunham, Sarah; Harvey, Reid; Krieger, Jackie; Vetter, Cheryl; Rao, Raj
Cc: Alston, Lala; Johnson, Yvonnew; Long, Pam

From: Loving, Shanita
Location: WJC-N 5400 + Video with OAQPS + 1 Ex. 6 - Personal Privacy ; Participant Code: Ex. 6 - Personal Privacy
Importance: Normal
Subject: NSR Improvement
Start Date/Time: Fri 12/1/2017 4:30:00 PM
End Date/Time: Fri 12/1/2017 5:15:00 PM
Wehrum Meeting Request_NSR Improvement.docx

To: Wehrum, Bill; Harlow, David; Gunasekara, Mandy; Lewis, Josh; Page, Steve; Koerber, Mike; Harnett, Bill; Wood, Anna; Kornylak, Vera; Santiago, Juan; Wayland, Richard; Dunham, Sarah; Harvey, Reid; Krieger, Jackie; Vetter, Cheryl; Rao, Raj
Cc: Alston, Lala; Johnson, Yvonnew; Long, Pam

From: Loving, Shanita
Location: WJC-N 5400 + Video with OAQPS + Ex. 6 - Personal Privacy Participant Code: Ex. 6 - Personal Privacy
Importance: Normal
Subject: NSR Improvement
Start Date/Time: Fri 12/1/2017 4:00:00 PM
End Date/Time: Fri 12/1/2017 4:45:00 PM
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To: Wehrum, Bill; Harlow, David; Gunasekara, Mandy; Lewis, Josh; Page, Steve; Koerber, Mike; Harnett, Bill; Wood, Anna; Kornylak, Vera; Santiago, Juan; Wayland, Richard;
Cc: Alston, Lala; Johnson, Yvonnew; Long, Pam

To: Dominguez, Alexander[dominguez.alexander@epa.gov]
From: POLITICO Pro Energy
Sent: Mon 12/11/2017 9:19:48 PM
Subject: Afternoon Energy: Chatterjee not giving up on interim rule — Hamm joins pro-Trump group's board — Offshore drilling plan on tap Tuesday

By Eric Wolff | 12/11/2017 04:18 PM EDT

With help from Anthony Adragna, Matt Daily, and Ben Lefebvre

CHATTIN' WITH CHATTERJEE: FERC Commissioner Neil Chatterjee, who gave up his interim chairman title last week, is still hoping to make his dream of an interim rule to save coal and nuclear plants come to reality. But he acknowledged that the short-term rule would have to thread a difficult policy needle he has not yet figured out, and the told the audience at an Axios event this morning that his top priority now is assessing the long-term reliance of the electric grid. "I still would like to get consensus on an interim step but it's complicated," he told reporters after his speech. He added, "I myself said things had to be legally defensible and not distort markets."

New FERC Chairman Kevin McIntyre last week secured a 30-day extension to respond to Energy Secretary Rick Perry's proposed grid rule, giving the commission until Jan. 10 to decide how to proceed.

Battery storage behind? Chatterjee told the audience at the Axios event that the battery storage rule FERC has been working on is farther behind than he expected it would be. Chatterjee had promised Sens. Ed Markey (D-Mass.) and Sheldon Whitehouse (D-R.I.) that he'd advance the rule, which would pay battery operators for services they provide the grid. "I intend to fulfill those commitment, it's just these major undertakings are complex and take time. I'm confident we'll get a result, it's just hard to say what time," he said.

Hi Kevin! Hi Neil! Chatterjee was away last week, so he said he would meet McIntyre as fellow commissioner for the first time today. He expects the grid rule to come up in their conversation.

Welcome to Afternoon Energy. I'm your host Eric Wolff, filling in for Kelsey Tamborrino. Send your thoughts, news and tips to ktamborrino@politico.com, mdaily@politico.com and njuliano@politico.com, and keep up with us on Twitter at @kelseytam, @dailym1, @nickjuliano, @Morning_Energy and @POLITICOPro.

HAMM JOINS PRO-TRUMP GROUP: Oil tycoon Harold Hamm, CEO of Continental Resources, joined the board of director for America First Policies, a nonprofit group that supports President Donald Trump's policies. The group has made an effort to pull together high level Trump supporters with access to Trump's Cabinet, including Perry, as POLITICO reported last month.

OFF SHORE PLAN DEETS TUESDAY: Trump will unveil the administration's new five-year drilling plan Tuesday, multiple sources told AE. Details are still scarce, but a few sources said they expect the plan to aggressively push for more drilling in federal waters. Tuesday's plan will

conclude the process Trump kicked off with his April 28 executive order. We'll still have to see how much appetite oil and gas companies will have for offshore drilling in federal waters in the current era of cheap oil prices — a lease sale for all available acres in the Gulf of Mexico earlier this year pulled in just over half the bids generated in a 2016 sale offering acres in just the central Gulf region.

HOW DEEP CAN WE MINE? Much has been written about the exploding value of bitcoin over the past several weeks and the dramatic increase in the amount of energy the cryptocurrency miners are gobbling up. But Newsweek reports that Digiconomist puts it in even starker terms: At the current rate of energy consumption growth, bitcoin mining will use all the world's energy by late 2020. That's based on sustaining the 25-percent jump in energy consumption over the last month — which is improbable, to say the least. Still, since the machines creating bitcoins right now are consuming an estimated 32.6 terawatt-hours of power a year and are heavily reliant on coal-fired power generation in China, the virtual currency is certainly having a real world impact.

THE SUPREMES WON'T PLAY THAT ONE: The Supreme Court today declined to hear a case involving EPA's enforcement of a key air permitting program, Alex Guillén reports . The lawsuit was brought by utility DTE Energy after EPA prosecuted the company for violating preconstruction permitting requirements, under which the company should have informed authorities before beginning a major project at one of its power plants. The ruling leaves in place a 6th Circuit opinion which grants EPA prosecutorial discretion. EPA Administrator Scott Pruitt last week issued a memo on this topic , noting that EPA will not pursue similar prosecution in the future unless actual emissions increase, and will not "second guess" industry's preconstruction projections of emissions impacts, Pruitt wrote.

IDSAL FOR EPA REGION 6: Pruitt has named Anne Idsal, a deputy land commissioner for the Texas General Land Office, to be regional administrator for EPA's Region 6, the agency said today, Emily Holden reports. The South Central region covers New Mexico, Texas, Oklahoma, Arkansas and Louisiana.

The more you know: Idsal's mom, Katharine Armstrong, a well-known Republican donor, owned the ranch where then-Vice President Dick Cheney shot his companion in a hunting accident.

TOP OF THE NINTH: The 9th Circuit Court of Appeals will hear both lawsuits over EPA's two major implementation rules for the 2016 update to the Toxic Substances Control Act, a small victory for environmentalists and public health advocates who had pushed for the San Francisco-based court to handle the litigation, Alex also reports this morning. Cases had been filed in both the 9th Circuit and the Richmond, Va.,-based 4th Circuit. The 9th circuit declined to release its cases, and last week EPA said it preferred to consolidate the cases into a single circuit.

MACRON PUTS HIS #MPGA WHERE HIS MOUTH IS: French President Emmanuel Macron is following through on his Make this Planet Great Again pledge, by facilitating climate research on French soil, POLITICO Europe's Sara Stefanini and Nicholas Vinocur report. He unblocked €30 million ($35.4 million) for grants and approving applications for 90 candidates to

work at France's elite National Center for Scientific Research out of some 250 climatologists who applied online. The government chose 18 scientists for €20 million ($23.6 million) in grants last month, around half of them from the U.S., and will announce their names at the One Planet Summit.

THEM METERS DONE GOT SMART: The Institute for Electric Innovation is out with a new report estimating 76 million smart meters will be installed throughout the country by the end of the year and installations are expected to hit 90 million by 2020. The group further says 40 electric companies have fully deployed the technology and 50 more are actively installing it. Link here.

USING THEIR (DRILLING) PULPIT: More than 50 African-American church leaders sent a letter today to congressional leaders urging them to remove provisions opening ANWR to oil and gas drilling from their final tax package. "We may live far from Alaska, but our plight as African Americans is one and the same, and thus the call to protect the land of the Gwich'in, the Arctic National Wildlife Refuge, is a common cause," they wrote.

QUICK HITS

— To Test for Climate Disasters: Build Stuff, Then Blow It Apart, New York Times

— Sources: Trump supports Pruitt's plan to question science, E&E

— Las Vegas judge hints at mistrial in Bunkerville standoff case, Las Vegas Review Journal

— Oil Prices Rise After NYC Explosion, WSJ

WIDE WORLD OF POLITICS

— Alabama Senate race hurtles to a dramatic finish

— Nebraska RNC official resigns to protest support of Moore

— Tax cuts alone won't cover full cost of GOP plan, Treasury says

To view online:
https://www.politicopro.com/newsletters/afternoon-energy/2017/12/chatterjee-has-a-vision-for-an-interim-rule-047434

Stories from POLITICO Pro

Pro-Trump group courts donors with Cabinet access Back

By Maggie Severns | 11/10/2017 03:22 PM EDT

Energy Secretary Rick Perry will headline an intimate gathering of high-powered business

executives in Texas next week for the pro-Trump outside group America First Policies, the first in a series of "roundtable discussions" giving donors face time with top Trump officials.

The Houston event featuring Perry, detailed in an invitation sent to a Republican donor and obtained by POLITICO, will include roughly 30 people and cover topics from energy policy to the Trump administration's broader agenda, America First spokeswoman Erin Montgomery said. Perry will not solicit donations from the attendees at the Monday event, which would be a violation of federal law — but America First officials plan to ask for contributions after Perry leaves the room.

The event highlights the cozy and growing ties between officials in President Donald Trump's administration and outside allies spending millions of dollars pushing administration policies this year. America First is brandishing its relationships with government officials to establish itself as the White House's preferred outside ally, among a mass of pro-Trump groups that have popped up this year.

In addition to holding more roundtable events, America First Policies recently held conference calls featuring White House Legislative Affairs Director Marc Short, House Majority Leader Kevin McCarthy and Rep. Erik Paulsen, all key players on tax reform. America First leaders also huddled with White House officials recently.

America First Policies and its affiliated super PAC, America First Action, plan to raise and spend $100 million supporting Trump's agenda in the next year. Super PACs are not permitted to coordinate with candidates and there are strict rules governing Cabinet officials' political activities. But there is a loophole: Perry and others can participate in events put on by America First's nonprofit policy arm, which is legally separate from the super PAC even though the same officers run both groups.

"As long as the super PAC and the 501(c)(4) each stays in its own lane they can both operate under the same umbrella," said Brett Kappel, a campaign finance lawyer and partner at Akerman LLP.

But campaign finance reform advocates said the arrangement crosses an ethical line.

"This is all part of the very close coordination we're seeing between the campaign itself and what's supposedly an outside group," said Craig Holman, the government affairs lobbyist at the good-government group Public Citizen. The activities constitute "coordination in anyone's definition except for the Federal Election Commission's," he said.

Perry is an ideal ambassador for America First Policies in Texas, where the former governor has deep ties to the energy industry and donors who fueled his state campaigns as well as two presidential bids.

An Energy Department spokesperson did not return a request for comment. Perry was in France this week meeting with energy leaders from other countries. He is slated to attend a similar meeting in Texas on Monday, prior to the America First event, with leaders from Canada and

Mexico.

America First was silent for much of this year and went through multiple staff shakeups, but has recently been working to restore its original position as the central group backing Trump's agenda.

But it has competition. Future45, which supported Trump during the 2016 elections with funding from casino billionaire Sheldon Adelson and the Ricketts family, announced a project that will spend in the tens of millions of dollars promoting tax reform earlier this month. Great America PAC, which is affiliated with former White House strategist Steve Bannon, began endorsing 2018 candidates in recent days.

Great America PAC's support for Roy Moore broke from Trump's support for Sen. Luther Strange in Alabama. America First plans to stay closely aligned with Trump and Trump's agenda, which Texas businessman Roy Bailey said could be a differentiator.

"We're not second-guessing anything; we're totally confident in [Trump's] ability to lead this nation and we're supporting him and the vice president," said Bailey, who is involved with America First.

That message has intrigued Texas-based energy executive Dan Eberhart, who said he hasn't yet made a donation to America First but is "interested in what they have to say."

"A lot of people who supported Republicans in 2016 are frustrated with the way things have turned out," Eberhart said. "If the Republican establishment won't support the president's agenda, we need alternatives who will."

To view online click here.

Back

Supreme Court won't hear case over air permit prosecution Back

By Alex Guillén | 12/11/2017 10:11 AM EDT

The Supreme Court today declined to hear a case involving EPA's enforcement of a key air permitting program.

The lawsuit was brought by utility DTE Energy after EPA prosecuted the company for violating preconstruction permitting requirements, under which the company should have informed authorities before beginning a major project at one of its power plants. The company complained that its measured emissions never actually increased once the project was complete.

The 6th Circuit Court of Appeals ruled earlier this year that emitters can be prosecuted for preconstruction violations even if post-project emissions never actually increased. Today's

rejection of the appeal by the Supreme Court leaves that ruling in place.

EPA Administrator Scott Pruitt last week issued a memo on this topic, noting that while the 6th Circuit said EPA has prosecutorial discretion in this type of enforcement. EPA will not pursue similar prosecution in the future unless actual emissions increase, and will not "second guess" industry's preconstruction projections of emissions impacts, Pruitt wrote.

WHAT'S NEXT: Pruitt has formed a task force to review and potentially revise the air permitting program.

To view online click here.

Back

EPA won't 'second guess' industry emissions projections in permitting program Back

By Alex Guillén | 12/08/2017 02:38 PM EDT

EPA will now defer to industry analyses on whether major projects will be subject to an important air permitting program, Administrator Scott Pruitt said in a Dec. 7 memo.

The change comes amid the Trump administration's review of the permits under the New Source Review program.

The Clean Air Act requires the owners of power plants and other emitters to study whether major upgrades to facilities will increase pollution. If so, the company must obtain an NSR permit from EPA, a process industry says is timely and costly.

Pruitt wrote that as long as companies follow the rules for how to project emissions, then "EPA does not intend to substitute its judgment for that of the owner or operator by 'second guessing'" a company's analysis. EPA will also allow companies to include in their projections any plans to "actively manage future emissions ... on an ongoing basis," which could make it easier for companies to avoid the permitting program.

In addition, Pruitt said EPA will not prosecute any companies whose analyses show they did not have to obtain permits unless measured emissions actually increase afterward, contrary to their projections.

The Supreme Court is considering whether to hear a lawsuit brought by utility DTE regarding these policies. The Trump administration urged the justices not to take the appeal, thus leaving in place a lower court ruling that EPA may — but does not have to — prosecute companies for not properly obtaining a permit if their real-world emissions did not increase afterward.

WHAT'S NEXT: The Supreme Court could say as early as Monday whether it will take the DTE appeal. In the meantime, EPA has formed an NSR task force to consider reforms to the

program.

To view online click here.

Back

EPA appoints Anne Idsal as Region 6 administrator Back

By Emily Holden | 12/11/2017 11:09 AM EDT

EPA Administrator Scott Pruitt has named Anne Idsal, a deputy land commissioner for the Texas General Land Office, to be regional administrator for EPA's Region 6, the agency said today.

The South Central region covers New Mexico, Texas, Oklahoma, Arkansas and Louisiana.

Idsal has been chief clerk and deputy land commissioner for nearly three years, according to her LinkedIn profile. Before that she was general counsel for the office and for the Texas Commission on Environmental Quality. She also served as special counsel and executive assistant to TCEQ Chairman Bryan Shaw.

Idsal interned for the Northern District of Texas and Texas Supreme courts. She also served as legal assistant for the Senate Judiciary Committee under Sen. John Cornyn (R-Texas).

To view online click here.

Back

Both TSCA rule challenges to be heard in 9th Circuit Back

By Alex Guillén | 12/11/2017 11:54 AM EDT

The 9th Circuit Court of Appeals will hear both lawsuits over EPA's two major implementation rules for the 2016 update to the Toxic Substances Control Act, a small victory for environmentalists and public health advocates who had pushed for the Western court to handle the litigation.

The Richmond, Va.,-based 4th Circuit Court of Appeals had been assigned all three lawsuits over EPA's evaluation rule, which determines how the agency will review chemicals under the law. The San Francisco-based 9th Circuit, meanwhile, was assigned the litigation over EPA's prioritization rule, which determined how EPA will pick which chemicals to review.

Both EPA and the environmentalists suing over the rules sought to have the cases moved to the same court — the 9th Circuit for green groups, the 4th Circuit for EPA. The 9th Circuit last month declined to release the suits over the prioritization rule. Last week EPA said that it would

prefer to have both cases in the same jurisdiction, paving the way for today's order from the 4th Circuit to move the evaluation rule lawsuits to the 9th Circuit.

WHAT'S NEXT: The 9th Circuit will take briefs in both cases and hear arguments over the rules, likely sometime next year. The cases could be assigned to the same panel of judges given the similar legal issues.

To view online click here.

Back

Alabama Senate race hurtles to a dramatic finish Back

By Gabriel Debenedetti | 12/11/2017 02:06 PM EDT

BIRMINGHAM, Ala. — On the day before voters cast their votes in Alabama's roller-coaster Senate special election, Democrat Doug Jones is enlisting last-minute help from former President Barack Obama, while Republican Roy Moore is expected to emerge from hiding at a final-hour rally with Steve Bannon.

The anticipation surrounding the highest-profile special election in years grew with a surprise poll from Fox News showing Jones ahead by double-digits — defying a slew of other surveys that had Moore clinging to a narrow lead.

While Moore prepped for an evening rally with Bannon, the former White House chief strategist and right-wing provocateur, Jones' campaign is circulated robocalls from Obama and former Vice President Joe Biden.

The flurry of 11th-hour activity was a fitting conclusion to a race that has captivated the country, with the possibility of Democrats picking off a coveted Senate seat in deep-red territory against a Republican accused of preying on teenagers as a man in his 30s. The contest has exposed some painful rifts in the Republican Party that have yet to heal during Donald Trump's tenure in the White House.

But it has also raised questions about Democrats' ability to win over African-American voters without Obama on the ballot, especially in Southern states where tough voter ID laws already make such turnout operations difficult.

Speaking to reporters at Chris Z's, a diner in Birmingham, on Monday, Jones dismissed the polling discrepancies and tried pivoting back to local matters by saying he cares for polls just as much as Nick Saban and Gus Malzahn, the coaches for the nationally-ranked University of Alabama and Auburn University football teams.

Still, Jones was careful not to confirm that Obama had recorded a supportive message for him, hyper-vigilant about appearing to accept support from such a controversial figure in such an

overwhelmingly Republican state.

"The only robo-call I know about for sure is the one from my wife," he said.

Appearing at his first of three planned events Monday, Jones immediately reminded the press of comments made by Sen. Richard Shelby, the longtime Alabama Republican who reiterated on Sunday that he had written in a candidate rather than vote for Moore.

Jones' campaign on Sunday quickly turned two clips of Shelby denouncing Moore into digital ads, and it kept a television spot featuring similar comments in rotation for the closing stretch. In order to win in a state that hasn't elected a Democrat to the Senate since Shelby himself in 1992 — before he switched parties — Jones' team is counting on conservatives turned off by Moore to either vote for him or write in a third option.

Pushing the write-in option, Democratic super PAC American Bridge on Sunday began targeting persuadable Republican voters with a digital ad urging them to back Saban. The editorial board of AL.com, a large newspaper group in the state, chipped in on Sunday as well, urging conservatives to follow Shelby's lead.

Moore, who disappeared from the campaign trail over the weekend to watch the Army-Navy football game in Philadelphia, according to Republicans close to his campaign, has spent the closing hours aiming to shore up his own support among the GOP base.

Declining to appear in public for days before Monday's rally — he even skipped church on Sunday — Moore instead stuck to friendly radio programs, while his allies bombarded local airwaves and screens with anti-Jones ads highlighting the Democrat's support for abortion rights and lashing him to the national party.

After Trump rallied for Moore just over the border in Pensacola, Fla. late last week, he also recorded a robo-call for the candidate. And joining the pro-Trump America First Action super PAC that has disclosed spending over $1 million for Moore this month, the Republican National Committee recently resumed its support for the candidate after earlier pulling out of a joint fundraising agreement with him.

Still, that move has not sat well with many Republicans aligned with the party establishment. In Monday, Nebraska RNC committeewoman Joyce Simmons resigned from the group.

"I strongly disagree with the recent RNC financial support directed to the Alabama Republican Party for use in the Roy Moore race. There is much I could say about this situation, but I will defer to this weekend's comments by Senator Shelby," she emailed fellow committee officials.

The move reflected one of Moore's central challenges: winning over pro-Trump Republicans who remain skeptical of him.

Solution Fund, a pro-Moore super PAC, on Monday emailed supporters asking for a final financial push making specifically that pitch.

"Hundreds of thousand[s] of voters that voted last November to stop Hillary Clinton did not vote in the September Alabama Senate Primary," the note read. "Our focus through election closing on Tuesday is to get these voters to polls."

To view online click here.

Back

Tax cuts alone won't cover full cost of GOP plan, Treasury says Back

By Bernie Becker | 12/11/2017 11:48 AM EDT

The Treasury Department said Monday that the GOP tax plan currently before Congress would need an assist from other Trump administration priorities to pay for itself.

Tax cuts alone aren't enough, Treasury said in a one-page analysis, citing welfare reform and infrastructure spending as additional boosts to the economy.

The analysis assumes that an economy led by Republicans would boost revenues by $1.8 trillion over a decade — more than enough to pay for the roughly $1.5 trillion in tax cuts envisioned by Republicans.

Treasury Secretary Steven Mnuchin has been saying for months that his department would produce an analysis that proved the tax cuts would be fully paid for, and other top Republicans like Senate Majority Leader Mitch McConnell have insisted they have no doubt that would be the case.

The White House drew some criticism earlier this year for assuming that economic growth would hit close to 3 percent a year under President Donald Trump's watch, and Democrats quickly lashed out at what Senate Minority Leader Chuck Schumer dubbed "fake math" in the new analysis.

"It's clear the White House and Republicans are grasping at straws to prove the unprovable and garner votes for a bill that nearly every single independent analysis has concluded will blow up the deficit and generate almost no additional economic activity to make up for it," Schumer said.

The Treasury analysis released Monday hits that $1.8 trillion revenue growth figure by assuming that long-term economic growth would hit 2.9 percent over the next 10 years, which is 0.7 percent higher than a baseline of previous projections.

But the vast majority of outside analyses have found that the GOP tax plans would fall far short of being fully offset. The Joint Committee on Taxation said the Senate tax bill would add about $1 trillion to the deficit over a decade, and the non-partisan Urban-Brookings Tax Policy Center said Monday that the Senate tax plan would increase gross domestic product by 0.7 percent in

2018 before falling off in ensuing years.

Most, but not all, of that extra economic growth projected by Treasury would come from the tax cuts themselves. Treasury assumes that corporate tax changes would spur half the economic expansion, while the other half would be come from a combination of new tax relief for "pass-through" businesses that pay taxes through the individual system and yet-to-be determined proposals for overhauling the welfare system and improving infrastructure.

"The Administration has been focused on tax reform and broader economic policies to stimulate growth, which will generate significant long-term revenue for the government," Mnuchin said in a statement.

Sen. Elizabeth Warren late last month asked Treasury's inspector general to probe the circumstances behind Mnuchin's economic growth claims.

"Either the Treasury Department has used extensive taxpayer funds to conduct economic analyses that it refuses to release because those analyses would contradict the Treasury Secretary's claims, or Secretary Mnuchin has grossly misled the public about the extent of the Treasury Department's analysis," she wrote

House and Senate GOP leaders are crafting a final tax plan behind closed doors. They plan to hold a public meeting Wednesday of the conference committee that would OK the legislation, with a goal of getting it to Trump's desk by Dec. 20 or sooner if possible, a source familiar with the matter said.

Seung Min Kim contributed to this report.

To view online click here.

Back

To: Harlow, David[harlow.david@epa.gov]
From: Dominguez, Alexander
Sent: Fri 10/6/2017 2:26:09 PM
Subject: Fwd: NSR Policy Memo
OGC NSR DTE issue options analysis 10-4 am draft.docx
ATT00001.htm
NSR policy memo_draft_10-4-17PSLrev.docx
ATT00002.htm

Sent from my iPhone

Begin forwarded message:

From: "Lewis, Josh" <Lewis.Josh@epa.gov>
Date: October 5, 2017 at 12:42:01 PM EDT
To: "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Cc: "Dominguez, Alexander" <dominguez.alexander@epa.gov>, "Dunham, Sarah" <Dunham.Sarah@epa.gov>
Subject: Fwd: NSR Policy Memo

Ahead of our weekly meeting tomorrow at 9, wanted to send the latest draft NSR policy memo. The other attachment is a document prepared by OGC which is an analysis of options for addressing NSR issues raised by DTE Ex. 5 - Deliberative Process
Ex. 5 - Deliberative Process

Concerning the policy memo, Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

OGC staff attorneys have reviewed this draft. The draft will go shortly to Justin, Lorie, and Gautam for review. Ex. 5 - Deliberative Process
Ex. 5 - Deliberative Process

We can talk more tomorrow about this, including next steps.

From: Dominguez, Alexander
Location: EPA HQ Room TBD
Importance: Normal
Subject: UJEP Staff Meeting (re: CPP/NSR)
Start Date/Time: Mon 10/30/2017 4:00:00 PM
End Date/Time: Mon 10/30/2017 5:00:00 PM
Final EPA Presidents' Letter 092117 Signed.pdf

Request:

Staff level meeting with the union groups signed onto the attached letter to discuss CPP replacement rule and NSR reform. All are members of Unions for Jobs & Environmental Progress (UJEP).

Attendees:

List to follow but staff from all unions on the letter will be present.

Contact:

Brian Kerkhoven

Energy Policy Advisor

North America's Building Trades Unions

815 16th St. NW, Suite 600

Washington, DC 20006

Direct - 202.756.4654

Cell - 202.494.7241

Email - bkerkhoven@buildingtrades.org

Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, NW
Washington, D.C. 20004

September 21, 2017

Re: Clean Power Replacement Rule and NSR Reform

Dear Administrator Pruitt:

We are writing on behalf of our members representing workers from the electric utility, mining, rail, and construction sectors. We have participated for many years in EPA rulemaking proceedings, including the MATS rule and the Clean Power Plan. Our members have engaged the international climate debate through the UN FCCC process, and through domestic climate legislation and litigation.

We understand that EPA is considering options for replacing the Clean Power Plan (CPP) with an alternative regulatory approach. We wish to take this opportunity to outline elements of a replacement rule based on power plant efficiency improvements.

The proposed framework strictly adheres to the statutory requirements for regulating existing sources under section 111(d) of the Clean Air Act (CAA). These requirements give states the primary role in regulating CO_2 emissions from existing EGUs through the establishment of CO_2 performance standards.

Section 111(d) of the CAA limits EPA's role to establishing a "procedure" for states to submit a plan for the establishment of CO_2 performance standards for existing EGUs. Section 111(d) provides states with primary responsibility for developing performance standards for EGUs in accordance with the "procedure" established by EPA.

Each state should have wide latitude to develop a plan that fits its individual circumstances and priorities. While EPA is responsible for determining the Best System of Emission Reduction (BSER) for source categories, EPA cannot dictate what a state must include or how a state must regulate sources within its jurisdiction. States should have authority to establish source-specific standards based on a variety of factors, including the remaining useful life of the unit, unreasonable cost of control, and physical impossibility of installing emissions control equipment.

EPA should establish a federal-state regulatory process establishing general procedures for states to follow in regulating CO_2 emissions from affected EGUs. These procedures would require each state to set CO_2 performance standards for each affected EGU based on site-specific factors. The form of the performance standards could be set, for example, as a range of CO_2 emissions rate limits for units subcategorized by boiler and coal type, as an "operational standard" that describes the efficiency and maintenance measures (either physical or operational) that should be performed to limit CO_2 emissions from the affected unit, or some combination of these approaches.

To assist states in setting such unit-specific performance standards, EPA should develop guidance on how states should account for variability in plant efficiency reflecting factors such as boiler design, coal type, unit age and size, load level, cooling system, and existing pollution controls. The CO_2 performance standard states establish for each unit would be deemed to meet the requirements of section 111(d).

We also believe that the CPP rulemaking provides EPA with an opportunity to revise current New Source Review (NSR) regulations through a parallel rulemaking. NSR reform would enhance the prospects for investments that would create jobs while modernizing the aging coal fleet. DOE's recent Baseload Power Study [1] highlighted the adverse impacts of current NSR regulations:

> The uncertainty stemming from NSR creates an unnecessary burden that discourages rather than encourages installation of CO2 emission control equipment and investments in efficiency because of the additional expenditures and delays associated with the permitting process. Ironically, the uncertainty surrounding NSR requirements has led to a significant lack of investment in plant and efficiency upgrades, which would otherwise lead to more efficient power generation, benefits to grid management, and reduced environmental impacts. EPA has acknowledged these burdens and has made attempts to reform the rules to improve and streamline NSR.[2]

The recently announced formation of an NSR Task Force within the agency is a positive step toward constructive NSR reforms.

We hope that these suggestions will be helpful to you and your staff as the agency moves forward in its consideration of a CPP replacement rule.

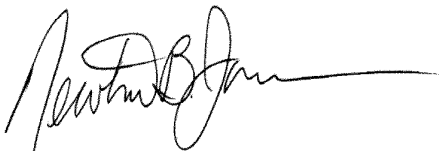
---

[1] U.S. Department of Energy, Staff Report to the Secretary on Electricity Markets and Reliability (August 2017).

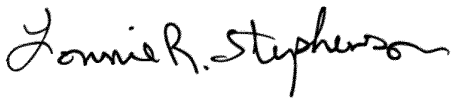
[2] Id., at 44 (footnotes omitted.)

Sincerely,

Eric Dean
General President
International Association of Bridge,
Structural, Ornamental, and Reinforcing
Iron Workers



Newton B. Jones
International President
International Brotherhood of
Boilermakers, Iron Ship Builders,
Blacksmiths, Forgers and Helpers

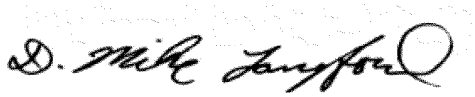


Lonnie R. Stephenson
International President
International Brotherhood of
Electrical Workers

Robert A. Scardelletti
National President
Transportation ● Communications ● Union, IAM

Mark McManus
General President
United Association of Journeymen and Apprentices of the
Plumbing and Pipe Fitting Industry of the United States and Canada

Cecil E. Roberts, Jr.
International President
United Mine Workers of America



D. Michael Langford
International President
Utility Workers Union of America

cc: Members of Congress
Richard L. Trumka
William L. Wehrum, Esq. (EPA Mail Code 6101A)
Mandy Gunasekara, Esq. (EPA Mail Code 1101A)

From: Traylor, Patrick
Location: WJCS-3216
Importance: Normal
Subject: NSR Memorandum Discussion
Start Date/Time: Mon 12/4/2017 6:00:00 PM
End Date/Time: Mon 12/4/2017 7:00:00 PM

To: Traylor, Patrick; Bodine, Susan; Schwab, Justin; Gunasekara, Mandy
Cc: Atkinson, Emily

To: Dravis, Samantha[dravis.samantha@epa.gov]
Cc: Jackson, Ryan[jackson.ryan@epa.gov]; White, Elizabeth[white.elizabeth@epa.gov]; Lewis, Josh[Lewis.Josh@epa.gov]
Sent: Thur 12/7/2017 3:47:45 PM
Subject: RE: NSR Memo

Thanks, Sam.

Elizabeth and Josh – do either of you need anything else to get this done? Give me a c

From: Dravis, Samantha
Sent: Thursday, December 7, 2017 10:46 AM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Jackson, Ryan <jackson.ryan@epa.gov>; White, Elizabeth <white.elizabeth@epa.gov>; Lewis, Josh <Lewis.Josh@epa.gov>
Subject: Re: NSR Memo

Let's get this autopenned thank you

Sent from my iPhone

On Dec 7, 2017, at 10:15 AM, Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> wrote:

> Attached is the final version of the NSR memo discussed with the Administrator yesterday. He would like to get this out today. Can we go ahead with auto-pen, since he's at the hearing? Once this is signed, we can send it out to the RAs and post to the website. I'm cc'ing Josh Lewis who is helping to coordinate.

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

<NSR policy memo_FINAL for Admin Signature 2017 12 07.docx>

From: Bailey, Ethel
Location: 3204WJC-South
Importance: Normal
Subject: NSR Memo, conference line, 1 [Ex. 6 - Personal Privacy] code [Ex. 6 - Personal Privacy]
Start Date/Time: Mon 12/11/2017 9:30:00 PM
End Date/Time: Mon 12/11/2017 10:00:00 PM

From: Bailey, Ethel
Location: 3204WJC-South
Importance: Normal
Subject: NSR Memo, conference line, 1 Ex. 6 - Personal Privacy , code Ex. 6 - Personal Privacy
Start Date/Time: Mon 12/11/2017 5:15:00 PM
End Date/Time: Mon 12/11/2017 5:30:00 PM

From: Bailey, Ethel
Location: 3204WJC-South
Importance: Normal
Subject: NSR Memo, conference line, 1 Ex. 6 - Personal Privacy, code Ex. 6 - Personal Privacy
Start Date/Time: Mon 12/11/2017 9:30:00 PM
End Date/Time: Mon 12/11/2017 10:15:00 PM

From: Loving, Shanita
Location: WJC-N 5400 + Video with OAQPS + 1 Ex. 6 - Personal Privacy Participant Code: Ex. 6 - Personal Privacy
Importance: Normal
Subject: NSR Improvement
Start Date/Time: Fri 12/1/2017 4:30:00 PM
End Date/Time: Fri 12/1/2017 5:15:00 PM
Wehrum Meeting Request_NSR Improvement.docx

To: Wehrum, Bill; Harlow, David; Gunasekara, Mandy; Lewis, Josh; Page, Steve; Koerber, Mike; Harnett, Bill; Wood, Anna; Kornylak, Vera; Santiago, Juan; Wayland, Richard; Dunham, Sarah; Harvey, Reid; Krieger, Jackie; Vetter, Cheryl; Rao, Raj
Cc: Alston, Lala; Johnson, Yvonnew; Long, Pam

From: Loving, Shanita
Location: WJC-N 5400 + Video with OAQPS + Ex. 6 - Personal Privacy ; Participant Code: Ex. 6 - Personal Privacy
Importance: Normal
Subject: NSR Improvement
Start Date/Time: Fri 12/1/2017 4:00:00 PM
End Date/Time: Fri 12/1/2017 4:45:00 PM
Wehrum Meeting Request_ NSR Improvement.docx

To: Wehrum, Bill; Harlow, David; Gunasekara, Mandy; Lewis, Josh; Page, Steve; Koerber, Mike; Harnett, Bill; Wood, Anna; Kornylak, Vera; Santiago, Juan; Wayland, Richard;
Cc: Alston, Lala; Johnson, Yvonnew; Long, Pam

To: Ford, Hayley[ford.hayley@epa.gov]
Cc: Ferguson, Lincoln[ferguson.lincoln@epa.gov]; Dravis, Samantha[dravis.samantha@epa.gov]
Subject: NSR Memo
NSR policy memo_draft final_2017 12 04.docx

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Dunham, Sarah[Dunham.Sarah@epa.gov]
From: Lewis, Josh
Sent: Tue 9/12/2017 6:17:46 PM
Subject: Re: NSR Memo

Got it, thanks Mandy. We'll share with OAQPS and go from there.

On Sep 12, 2017, at 1:57 PM, Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> wrote:

> Following up from Friday, attached are a few points regarding the NSR memo I mentioned. This should get things started.
>
> **Mandy M. Gunasekara**
>
> Senior Policy Advisor for Office of Air and Radiation
>
> Office of the Administrator
>
> US Environmental Protection Agency
>
> <Emissions Projection Rule_Outline_DRAFT.docx>

From: Bailey, Ethel
Location: 3204WJC-South
Importance: Normal
Subject: NSR Memo, conference line, 1 Ex. 6 - Personal Privacy , code Ex. 6 - Personal Privacy
Start Date/Time: Mon 12/11/2017 9:30:00 PM
End Date/Time: Mon 12/11/2017 10:00:00 PM

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
From: Traylor, Patrick
Sent: Tue 8/29/2017 12:28:17 AM
Subject: DTE
17-__PetitionForWritOfCertiorari.pdf
ATT00001.htm

Cert. petition.

Patrick Traylor
Deputy Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
(202) 564-5238 (office)
(202) 809-8796 (cell)

NO. _____

In the
Supreme Court of the United States

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. SOLO
ANDREA E. HAYDEN
Of Counsel
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One Energy Plaza
Detroit, MI 48226

F. WILLIAM BROWNELL
Counsel of Record
HUNTON & WILLIAMS LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
bbrownell@hunton.com
(202) 955-1500

Counsel for Petitioner
(additional counsel listed on signature page)

July 31, 2017

QUESTION PRESENTED

The Clean Air Act's (CAA) New Source Review (NSR) program regulates industrial growth throughout the country, requiring preconstruction permits for large new industrial facilities and for existing ones that undergo "modification." As Justice Kennedy observed in *Alaska Department of Environmental Conservation* v. *Environmental Protection Agency*, 540 U.S. 461, 516-17 (2004) (Kennedy, J., dissenting), "the time for [permit] approval [for a complex project] can take from five to seven years," impacting decisions on industrial improvement and development across the nation.

Because NSR regulates "new" sources of air pollution—projects that increase the amount of emissions and thus deteriorate air quality—these provisions apply to an existing power plant only when it undergoes "modification," which the statute defines as a physical change at the plant that "increases the amount" of pollution. 42 U.S.C. § 7411(a)(4). The U.S. Environmental Protection Agency's (EPA) regulations, in like fashion, state that a change is a "major modification" if it causes a significant increase in emissions. 40 C.F.R. § 52.21(a)(2)(iv)(*a*), (*b*); *id.* § 52.21(b)(2). Conversely, a physical change "is not a major modification if it does not cause a significant emissions increase." *Id.* § 52.21(a)(2)(iv)(*a*).

The question presented here is whether, contrary to the text of the statute and EPA's regulations, the Government can treat a maintenance project that demonstrably has not caused a significant increase in emissions as a major modification that triggers NSR permitting requirements.

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the U.S. Court of Appeals for the Sixth Circuit:

1. DTE Energy Company and Detroit Edison Company, petitioners on review, were Defendants-Appellees below.

2. The United States of America, respondent on review, was a Plaintiff-Appellant below.

3. The Sierra Club was an Intervenor-Plaintiff-Appellant below.

CORPORATE DISCLOSURE STATEMENT

Petitioner DTE Energy Company has no parent corporation and no corporation owns 10% or more of its stock. Petitioner Detroit Edison Company, now known as DTE Electric Company, is a wholly owned subsidiary of DTE Energy Company.

TABLE OF CONTENTS

APPENDIX MATERIALS:

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Federal Statutes:

Legislative History:

Federal Regulations:

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the Sixth Circuit Court of Appeals are reported at 711 F.3d 643 (*DTE I*) and 845 F.3d 735 (*DTE II*) and are reproduced at App. 62a-85a and App. 1a-47a, respectively. The opinions of the District Court are unreported but are published at No. 10-13101, 2011 WL 3706585 (E.D. Mich. Aug. 23, 2011) and No. 10-cv-13101, 2014 WL 12601008 (E.D. Mich. Mar. 3, 2014) and are reproduced at App. 86a-99a and App. 57a-61a.

JURISDICTION

The Court of Appeals issued its opinion on January 10, 2017, App. 1a-47a, and denied rehearing en banc on May 1, 2017, App. 48a-49a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the CAA, 42 U.S.C. §§ 7401 *et seq.*, are reproduced at App. 100a.

Relevant provisions of EPA's regulations implementing the CAA are reproduced at App. 101a-106a.

STATEMENT

In 2010, DTE replaced worn components on its Monroe 2 power plant. Before starting this maintenance, DTE evaluated whether the projects qualified as "major modifications" that would trigger the Clean Air Act's (CAA) costly and time-consuming New Source Review (NSR). By statute and regulation, a physical change to an existing plant triggers NSR only if it "increases the amount" of pollution. 42 U.S.C. § 7411(a)(4). Accordingly, a project "is not a major modification if it does not cause a significant emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*a*). Based on its preconstruction projections, DTE concluded that the projects would not cause an increase in pollution over and above that occurring in the immediate past. And DTE has proven right. In fact, emissions at Monroe 2 *decreased* after the projects.

The Government nonetheless filed this enforcement action after the projects were completed, claiming that the projects were major modifications and demanding millions of dollars in civil penalties for DTE's failure to seek the permits that major modifications require. According to the Government, DTE violated the statute and the regulations by failing to project in advance that the projects would cause a significant emissions increase—even though it is now known as a matter of undisputed fact that they did not actually do so. And to add insult to injury, the Government seeks to *penalize* DTE for failing to make that demonstrably inaccurate preconstruction emissions projection.

The district court and two members of the Sixth Circuit panel that heard the case agreed that this Orwellian type of enforcement action should not be able to proceed. Yet, due to the vagaries (and misap-

plication) of the law-of-the-case doctrine, one of the panel members deemed herself bound by her interpretation of an earlier panel decision from which she dissented to allow the Government to proceed with its novel effort to declare the projects major modifications on the theory that DTE should have erroneously projected an emissions increase that did not actually materialize.[1]

That result cannot be reconciled with law, logic, or basic norms of due process. As a matter of common sense, a statute that is triggered only when a project "increases the amount" of pollution, 42 U.S.C. § 7411(a)(4), cannot be triggered by a project that did not increase the amount of pollution. To the extent there were any doubt on that score, the governing regulations eliminate it, as they expressly confirm that a project "is not a major modification if it does not cause a significant emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*a*). Simply put, the statute is concerned with whether a project *actually* increases emissions, not with whether the Government *thought* the project would do so. The Government may not use its own demonstrably flawed *projections* to declare a project a major modification after the fact when the project concededly did not *actually* increase emissions.

The Sixth Circuit's contrary conclusion will have disastrous consequences for the entire regulated industry, as it injects even greater uncertainty—indeed, incoherence—into a regulatory scheme that is hardly known as a model of clarity. Left standing, the decision below threatens to paralyze substantial

---

[1] The Sixth Circuit has stayed its mandate pending this Court's review. App. 50a-51a.

maintenance projects throughout the nation. If NSR can be triggered, and penalties imposed, even when an operator *correctly* predicts that a project will not increase emissions, then operators are left with no way to meaningfully assess the costs and benefits of proceeding with such projects. That is not the regulatory scheme that Congress envisioned; nor is it the regulatory scheme that this Court's decisions contemplate. The Court should grant certiorari and reject the Government's extraordinary claim that it may penalize an operator for failing to predict an emissions increase that did not come to pass.

I. The Clean Air Act and the Role of "New Source Review"

The CAA regulates new and existing major stationary sources differently. In general, *new* sources must undergo preconstruction review and permitting, dubbed "New Source Review" or "NSR". As part of this process, these new sources may be required to install additional emission controls. Congress imposed these obligations on new sources because it determined that new sources could incorporate more cost-effectively and efficiently those types of emissions controls into their designs as they were being built than could existing sources. See, *e.g.*, H.R. REP. NO. 95-294, at 185 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1264.

For truly new sources, like a brand new power plant, NSR plainly applies. The statute, however, also defines a new source to include existing sources that undergo "modification." 42 U.S.C. § 7411(a)(2), (4). This case concerns when a repair project at an existing plant qualifies as a "modification" (or, in the parlance of the NSR regulations, a "major modification") that triggers NSR.

Under the statute, a triggering "modification" is "any physical change in, or change in the method of operation of, a stationary source which *increases the amount* of any air pollutant emitted by such source … ." 42 U.S.C. § 7411(a)(4) (emphasis added). The statute thus "unambiguously defines 'increases' in terms of actual emissions." *New York* v. *EPA*, 413 F.3d 3, 38-40 (D.C. Cir. 2005) (*per curiam*).

So do EPA's regulations. The 1980 version of the rules, this Court observed, is "relatively clear" on this point. The rules "require a permit for a modification … only when it would increase the actual annual emission of a pollutant above the actual average for the two prior years." *Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 569 (2007). The 2002 revision to the rules is even clearer: "[A] project is a major modification … if it causes … a significant emissions increase … . The project is not a major modification if it does not cause a significant emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*a*).

This unambiguous statutory command has led EPA to emphasize time and again that NSR is directed at limiting emissions increases. "[The] [NSR] program's *limited object is to limit significant emissions increases* from new and modified sources."[2] The NSR rules are thus designed to ensure "that *only* changes causing a *real* increase in pollution are subject to NSR." Br. for Resp't EPA at 76, *New York* v.

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[2] EPA, EPA-456/R-03-005, *Technical Support Document for the Prevention of Significant Deterioration (PSD) and Nonattainment Area New Source Review (NSR): Reconsideration* at 105 (Oct. 30, 2003) (emphasis added), https://www.epa.gov/sites/production/files/2015-12/documents/petitionresponses10-30-03.pdf (last visited July 28, 2017).

EPA, No. 02-1387, 2004 WL 5846388, at *76 (D.C. Cir. Oct. 26, 2004) (emphases added).

II. The Project-and-Report System for Determining NSR Applicability.

1. While EPA's 1980 regulations may have been "relatively clear" in requiring an annual increase in actual emissions for a major modification to occur, *Duke Energy,* 549 U.S. at 569, they could claim no such clarity regarding the process for assessing in advance whether a project at an existing plant would qualify as a major modification. As construed by the courts, EPA's 1980 rules contemplated a preconstruction judgment of whether a "change" is "projected" to cause a "significant net increase" in emissions over baseline levels. See, *e.g., United States* v. *Cinergy Corp.*, 458 F.3d 705, 709 (7th Cir. 2006).

But the regulations were ambiguous about what this preconstruction judgment should entail. See, *e.g., id.* ("[W]hat is required … is … merely a reasonable estimate of the amount of additional emissions that the change will cause."); see also *Duke Energy*, 549 U.S. at 577 (explaining "the 1980 PSD regulations may be no seamless narrative," but "[w]hat these provisions are getting at is a measure of actual operations averaged over time"). At one point, the Government went so far as to argue that the test should measure actual emissions during a baseline period against the maximum potential for the unit to emit in the future. See *Wis. Elec. Power Co.* v. *Reilly* (*WEPCo*), 893 F.2d 901, 918 (7th Cir. 1990). This meant that, for any unit that did not run at full potential during the baseline period—for example, if the unit was not dispatched due to a lack of demand—even changing a light bulb might qualify as a major modification, because the unit's potential to

emit would always be greater than its actual baseline emissions. The Seventh Circuit rejected this extreme theory, *id.* at 918, but the fact that the regulations would tolerate such an argument at all underscored the need for regulatory reform.

2. EPA began those reforms in 1992, taking the first steps toward the project-and-report system that exists today. See 57 Fed. Reg. 32,314 (July 21, 1992). Several aspects of this initial foray are relevant here.

Most significantly, the 1992 revisions specified for electric utilities a clarified emission projection technique that emphasized the importance of determining whether the change—as opposed to other factors, like demand—would cause an increase. Called "the 'representative actual annual emissions' methodology," this procedure required utilities to project future emissions based on anticipated operations. After excluding emission increases not caused by the project (referred to colloquially as the "demand growth exclusion"),[3] the projected emissions were

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[3] The regulations implement the NSR causation requirement by:

> Exclud[ing], in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

40 C.F.R. § 52.21(b)(33)(ii) (1993). This causation provision is often referred to as the "demand growth exclusion" because de-

compared to a baseline period to determine whether an increase in actual emissions was projected to occur as a result of the project. EPA coupled this pre-project emission projection with a "post-construction" monitoring requirement for sources opting to use this new emission projection approach. *Id.* at 32,325.

This test, in particular the so-called "demand growth exclusion" causation requirement, concerned some commenters. How would EPA guard against the possibility that a utility might understate—either innocently or intentionally—the company's expectation regarding future emissions? EPA found this concern misplaced, because the post-construction monitoring would "guard against the possibility that significant increases in actual emissions attributable to the change may occur under this methodology." *Id.* at 32,325. EPA explained further that "NSR applies only where the emissions increase is caused by the change," and "[i]f … the reviewing authority determines [based on post-project data] that the … emissions have in fact increased significantly over baseline … as a result of the change, the source would become subject to NSR requirements *at that time*." *Id.* (emphasis added).

In the years that followed, EPA evaluated the effectiveness of these reforms and pondered whether to keep them. EPA worried that the project-and-report system gave operators too much leeway in making projections:

> [T]he demand growth exclusion is problematic because it is *self-implementing and self-policing*. Because *there is no specific test*

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mand growth is explicitly listed in it as an example of an independent factor that is unrelated to the change.

> *available for determining whether an emissions increase indeed results from an independent factor such as demand growth, versus factors relating to the change at the unit*, each company with a utility unit presently adopts its own interpretation. Interpretations may vary from source to source, as well as from what a permitting agency would accept as appropriate.

63 Fed. Reg. 39,857, 39,861 (July 24, 1998) (emphases added). EPA thus proposed not only to eliminate the demand-growth exclusion, but also to require the operator to submit its projection to the permitting authority for approval and the imposition of permit limits based on the projection. *Id.* at 39,862. Given the incompatibility of such an approach with the statutory causation requirement and with the need for timely industrial repair and maintenance, 67 Fed. Reg. 80,186, 80,244 (Dec. 31, 2002), EPA in its 2002 rulemaking not only kept the demand growth exclusion, but also expanded its availability. As EPA noted, a robust regime of pre-construction projections and post-construction monitoring of *actual* emissions is more than sufficient for permitting authorities to police sources' application of the demand growth exclusion. 72 Fed. Reg. 72,607, 72,610-11 (Dec. 21, 2007).

3. The 2002 revisions to the rules, which govern the present dispute, clarified some aspects of the 1992 rules and beefed up the reporting requirements.

First, the 2002 rules clarify how emissions should be projected before a project is commenced and how that projection will be judged after the project is completed. Under the rules, the "procedure for calculating (before beginning actual construction)

whether a significant emissions increase … will occur depends upon the type of emissions units being modified." 40 C.F.R. § 52.21(a)(2)(iv)(*b*). For projects like those at issue here that only involve existing emissions units:

> [a] significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions … and the baseline actual emissions … for each existing emissions unit, equals or exceeds the significant amount for that pollutant.

Id. § 52.21(a)(2)(iv)(*c*).[4]

Reflecting the causation requirement of the statute and regulations,[5] the "projected actual emissions" rule requires that the owner/operator "[s]hall exclude, in calculating any increase in emissions that

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[4] "Baseline actual emissions" is defined as "the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 5-year period immediately preceding when the owner or operator begins actual construction of the project." 40 C.F.R. § 52.21(b)(48)(i). "Projected actual emissions" is defined as the "maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit" a regulated PSD pollutant "in any one of the 5 years (12-month period) following the date the unit resumes regular operation after the project." *Id.* § 52.21(b)(41)(i). In determining projected actual emissions before the project, "the owner or operator … [s]hall consider all relevant information," including the "company's own representations," its "expected business activity," and its "filings with the State or Federal regulatory authorities." *Id.* § 52.21(b)(41)(ii)(*a*).

[5] 67 Fed. Reg. at 80,203 ("Both the statute and … regulations indicate that there should be a causal link between the proposed change and any post-change increase in emissions.").

results from [t]he particular project, that portion of the unit's emissions following the project" that the unit "could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions ... and that are also unrelated to the particular project, including any increased utilization due to product demand growth." *Id.* § 52.21(b)(41)(ii)(*c*).

The result of the projection dictates what happens next. If the operator projected that its project would cause a significant net emissions increase, the operator must get a permit. See 40 C.F.R. § 52.21(a)(2)(iii). At the other end of the spectrum are projects not projected to cause a significant increase or even a reasonable possibility of one. For those projects, the operator must monitor and report emissions as required by other CAA rules. See *generally* 72 Fed. Reg. at 72,612-13 (describing the numerous other monitoring and reporting requirements applicable to emissions sources). But for those projects, the NSR rules do not require the operator to maintain a record of its preconstruction analysis or monitor post-construction emissions.

In the middle are projects that the operator does not expect to cause a significant net emissions increase but that nonetheless create a "reasonable possibility" of such an increase. These projects trigger additional reporting obligations.[6] For all such rea-

[6] A "reasonable possibility" exists if one of two criteria are satisfied: (1) the projection shows an emissions increase of at least 50% of the significant amount before accounting for causation (*i.e.*, before excluding increases in emissions that the unit was capable of accommodating but that are unrelated to the project), 40 C.F.R. § 52.21(r)(6)(vi)(*b*); or (2) the project is projected to cause an emissions increase for any pollutant of at

sonable-possibility projects, "[b]efore beginning actual construction ..., the owner or operator shall document and maintain a record" that contains the "projected actual emissions, the amount of emissions excluded under paragraph (b)(41)(ii)(*c*) ... and an explanation for why such amount was excluded," as well as a "description of the project" and an "[i]dentification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project." *Id.* § 52.21(r)(6)(i)(*a*)-(*c*). And in some instances, "before beginning actual construction, the owner or operator" must also provide its preconstruction analysis to the permitting authority. *Id.* § 52.21(r)(6)(ii).

Because actual emissions will be the decisive factor, the operator is not "require[d] ... to obtain any determination from the Administrator before beginning actual construction" for any project, including those with a reasonable possibility of an increase *Id.* Rather, once pre-project analysis and recordkeeping requirements are met (*i.e.*, notification is sent to the permitting authority or records are maintained, as applicable under the rules), the rules provide that construction may begin. When construction is complete, the operator then must calculate and maintain a record of emissions in tons per year of any NSR-regulated pollutant and (for electric generating units) report those emissions to the relevant regulatory authority annually. *Id.* § 52.21(r)(6)(iii)-(iv).

4. As explained above, the 2002 rules state unequivocally that "a project is a major modification for a regulated NSR pollutant if it causes ... a signifi-

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least 50% of the significant amount (but less than 100% of that amount), *id.* § 52.21(r)(6)(vi)(*a*).

cant emissions increase … and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*a*). And in the very next sentence, the rules make clear that a "project is *not* a major modification *if it does not cause a significant emissions increase*." *Id.* (emphases added). Just so; that is what the statute says, too.[7]

But EPA also clarified in the 2002 revisions that *projections* are not the ultimate measure of whether a project is, in fact, a major modification. After describing how an operator should project post-project emissions, EPA makes clear that, "[r]egardless of *any such* preconstruction projections, a major modification" depends on whether "the project *causes a significant emissions increase*." *Id.* § 52.21(a)(2)(iv)(*b*) (emphases added). This provision applies expansively to "any such" projection, whether it is the actual preconstruction projection performed by the operator or, instead, is a post-hoc preconstruction projection prepared by the government in an attempt to show that the operator should have projected an increase.

The monitoring and recordkeeping requirements imposed on "reasonable possibility" projects underscore the primacy of actual post-project data over preconstruction projections. The rules identify those projects that present a greater risk of causing an increase and impose independent monitoring requirements to help determine whether a major modification has taken place. As EPA previously had explained, this type of post-project monitoring and reporting "provide[s] a reasonable means of determining whether a significant increase … resulting from a proposed change … occurs within the 5 years [or 10

[7] 42 U.S.C. § 7411(a)(4).

years] following the change." 57 Fed. Reg. at 32,325. So if, irrespective of any pre-project determination of no increase due to the project, the agency "determines that the source's emissions have *in fact* increased significantly over baseline levels as a result of the change, the source would become subject to NSR requirements *at that time*." *Id.* (emphases added).[8]

III. Facts and Procedural History.

1. From March to June 2010, DTE shut down its Monroe 2 power plant to replace older boiler tubes. As required by the regulations, DTE performed the projected actual emissions test to determine whether the replacement would qualify as a major modification. DTE concluded that the planned maintenance projects would not cause a significant net emissions increase but that there may be a reasonable possibility of one. So DTE provided the required notice to the State of Michigan and then commenced construction. After construction was complete, DTE monitored its emissions. In the years since the project, emissions at Monroe 2 have decreased substantially.

2. The Government filed this enforcement action in August 2010, mere weeks after DTE had completed the projects and resumed operations—well before annual data were available to show whether Monroe

[8] EPA reaffirmed this feature of the 2002 rules when it explained that it is unnecessary to treat pre-project projections as enforceable limits. "The Act provides ample authority to enforce the major NSR requirements if your ... change results in a significant net emissions increase." 67 Fed. Reg. at 80,204. Thus, if post-project annual emissions "differ[] from your projection of post-change emissions ... then you must report this increase." *Id.* at 80,197. This, EPA said, "[e]nsures [t]hat ... [a] project is not a major modification." *Id.*

2 had emitted any regulated pollutant at greater-than-baseline levels, much less whether the projects had *caused* emissions to increase. The Government sought to substitute for that required proof the opinion testimony of litigation-retained experts, who would testify that DTE should have projected an increase.

The district court granted DTE summary judgment. In the absence of evidence of a significant increase in actual emissions, the court concluded that the Government could not meet its burden of proving that a major modification had occurred.[9] The Government then appealed, and in a 2-1 decision, the Sixth Circuit reversed.[10]

3. Judge Rogers, writing for the majority in *DTE I*, found the district court's 2011 analysis "largely correct."[11] But he concluded that judgment was premature, because the district court had not considered a subordinate question the Government had not presented—whether DTE had followed the "instructions" in EPA's NSR regulations for making preconstruction projections.[12] As Judge Rogers explained, the Government should not be allowed to second-guess the manner in which DTE performed the projection, because that would turn a project-and-report scheme into a very different prior approval scheme.[13] But because NSR is a preconstruction permitting program, he concluded that the lower court should assess whether, at a basic level, DTE

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[9] App.96a-97a.

[10] App. 62a-85a.

[11] App. 74a.

[12] App. 80a.

[13] App. 75a.

followed the "instructions" in the regulations for making preconstruction projections.[14]

Judge Rogers thus endorsed a significant distinction. An operator could violate the projection regulations—perhaps by performing no projection at all or otherwise using "an improper baseline period"—without necessarily rendering the project a major modification.[15] Should the Government prove that the operator failed to follow these basic instructions, the remedy would not be to treat the project as a major modification that should have required a permit, or to penalize the operator for proceeding without one. Instead, the remedy would simply be an injunction requiring the operator to "'do the projection right.'"[16]

Judge Batchelder dissented and would have affirmed, because the projects had not (and still have not) caused a significant increase in emissions. Under the plain text of the regulations, Judge Batchelder explained, this undisputed fact precludes any finding that the projects were, in fact, major modifications.[17] In her view, the question the majority remanded the case for the district court to consider was not even part of the case. The Government, she noted, did not contend that DTE had failed to follow the instructions for making projections. Instead, the Government contended that the 2010 projects at Monroe 2 were, in fact, major modifications, based on its experts post hoc preconstruction emission projec-

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[14] App. 80a.

[15] App. 76a.

[16] App. 77a.

[17] App. 82a-83a; see also App. 15a-16a (Batchelder, J., concurring).

tions—even though those projections were at odds with DTE's actual post-construction emissions. So in spite of the express language limiting the scope of the remand, Judge Batchelder posited that the majority had secretly—and contrary to the express language of the majority's opinion—concluded that the Government could meet its burden by second-guessing DTE's preconstruction projection.[18]

4. On remand, the district court followed the Sixth Circuit's mandate and evaluated whether DTE had complied with the projection regulations. The Government, the court explained, does not "contend that [DTE] violated any of the agency's regulations when [it] computed the preconstruction emission projections from Unit 2."[19] The Government instead challenged DTE's judgment in applying the "demand growth exclusion"—the Government would have applied the exclusion differently.[20] This, held the district court, was "second-guessing," which the Sixth Circuit put out of bounds.[21] The district court observed further that based on post-project data, the Government's "own preconstruction emission projections are now verifiably *inaccurate*."[22] Thus, not only was the Government seeking to second-guess DTE's projection, it was doing so on the basis of its own demonstrably incorrect projection.

The artificiality of the Government's position is best illustrated in this simple point. Ignoring reality entirely, the Government used experts to project *hy-*

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[18] App. 83a-85a.

[19] App. 59a-60a.

[20] App. 60a.

[21] App. 60a.

[22] App. 60a.

pothetical emissions *after* the projects were completed, instead of using the actual emissions that were observable by the time. Worse still, the government *projected* that emissions would increase when, as a matter of proven fact, they had actually decreased.

The Government again appealed.

5. By a 2-1 vote, with no opinion commanding a majority, the Sixth Circuit reversed.[23]

Judge Rogers, author of *DTE I*, voted to affirm. In his view, the district court had faithfully applied the Sixth Circuit's mandate.[24]

Judge Daughtrey voted to reverse and authored an opinion that bears scant resemblance to the opinion she joined in *DTE I*.[25] She opined that DTE failed to provide sufficient information in its preconstruction notice to the State of Michigan, even though the majority in *DTE I* concluded that the notice was sufficient.[26] She dismissed as, "technically speaking, *dictum*" the *DTE I* majority's repeated instructions that the Government should not be allowed to second-guess DTE's preconstruction projection.[27] She then asserted that "the panel unanimously agrees" that post-construction emissions are irrelevant, even though the *DTE I* majority devoted several pages to the importance of post-construction emissions,[28] and Judge Batchelder in *DTE I* consid-

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[23] App. 1a-47a.

[24] App. 33a-34a.

[25] App. 2a-12a.

[26] App. 74a.

[27] App. 6a.

[28] App. 11a-12a; App. 77a-79a.

ered the absence of a post-construction emissions increase dispositive.[29]

Judge Batchelder did not join Judge Daughtrey's flawed opinion, but nonetheless voted to reverse. Accorded the opportunity to write on a blank slate, she would have affirmed.[30] But she considered herself bound by her reading of the majority's holding in *DTE I*—*i.e.*, that "USEPA may use its own expert's pre-construction predictions to force DTE to get [an NSR] construction permit (or to punish DTE for failing to get [an NSR] permit), even if USEPA's disagreement is based on debatable scientific or technical reasons and even if actual events have proven USEPA's prediction wrong."[31]

* * *

So the final tally in the lower courts is 3-1 in favor of DTE. The district court, Judge Rogers, and Judge Batchelder each concluded that DTE is entitled to judgment as a matter of law. More specifically, each concluded that, under the plain text of the statute and EPA's regulations, a project that has not caused a significant increase in emissions cannot be a "major modification." Yet, due to an application of the law of the case doctrine that was itself incorrect, the Sixth Circuit has nonetheless allowed the case to proceed on the theory that the projects could constitute a major modification even though emissions not only did not increase, but have actually decreased.

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[29] App. 83a.

[30] App. 13a-14a.

[31] App. 19a.

REASONS FOR GRANTING CERTIORARI

The Sixth Circuit's suite of opinions over two appeals has produced a result that is irreconcilable with the text of the statute and the regulations, and represents a clear departure from this Court's precedent. The statute and regulations could not be more emphatic that, if a project does not increase emissions, then it does not qualify as a major modification. Yet this enforcement action has been allowed to proceed on the theory that whether a project actually increased emissions is *irrelevant* to the major modification analysis. Instead, all that matters is whether the Government thinks the operator should have *predicted* that the project would increase emissions—even if post-construction data have proven that such a prediction would have been incorrect. The controlling decision below did not begin to explain how that bizarre result could be reconciled with the text of the statute or the regulations, let alone with the reality that the Government is the first one to invoke actual emissions data when those data show an emissions *increase* triggering NSR. That is because neither the statute nor the regulations allow the Government to invoke actual emissions data when they support its position, then turn around and declare those data irrelevant when they do not.

The decision below is not only demonstrably wrong, it also injects uncertainty into an important and far-reaching regulatory program that applies to every major industrial development. The ambiguity created by the multiple opinions below and the lower court's mandate creates a choke point on the route to innovation and economic expansion. This Court has not hesitated to intervene when the lower courts have injected untenable uncertainty and unpredicta-

bility into the NSR program in the past, and it should not hesitate to do so again here.

I. The Sixth Circuit's Multiple Opinions Produce a Result That Is Irreconcilable with the Statute, the Regulations, and the Basic Norms of Due Process.

The theory on which this enforcement action has been allowed to proceed is untethered to the statutory trigger of the NSR program—actual emissions increases. Instead, it would substitute for the unambiguous definition of major modification in EPA's regulations—*i.e.*, a project that causes a significant increase in emissions—an ad hoc definition that changes with every case. This approach violates due process and does not even command support from a majority of the Sixth Circuit panel below.

A. The Theory on which this Enforcement Action Has Been Permitted to Proceed Violates the Text of the Statute and the Regulations.

1. As a matter of historical fact, DTE's projects did not cause a significant increase in emissions. That should be the end of this case. Certainly so under the statute, which defines an NSR-triggering "modification" as a project that "increases the amount of any air pollutant emitted by" Monroe 2. See 42 U.S.C. § 7411(a)(4). So too under EPA's regulations, which states in the plainest of terms that a "project is not a major modification if it does not cause a significant emissions increase." See 40 C.F.R. § 52.21(a)(2)(iv)(*a*).

The Sixth Circuit has nonetheless allowed this enforcement action to proceed, on the theory that whether a project increases emissions within the

meaning of the statute depends not on whether the project *actually* increases emissions, but on whether the Government thinks the operator should have *predicted* that the project would increase emissions—even if it is clear by the time of the enforcement action that any such prediction would have proven incorrect. In other words, so long as the Government can find some experts willing to say they would have reached a different conclusion than the operator had they been tasked with making the *preconstruction* projection, then the project's actual *post-construction* emissions are irrelevant even if they conclusively prove that the government's oxymoronic "postconstruction preconstruction projection" is wrong.

That is truly bizarre. Elevating the importance of retrospective "projections" over that of real-world data not only ignores the statutory and regulatory triggers for NSR, it also defies the regulations' command that projections take a back seat to reality. "Regardless of *any such* preconstruction projections, a major modification" depends on whether "the project *causes a significant emissions increase* … ." *Id.* § 52.21(a)(2)(iv)(*b*) (emphases added). When post-construction emissions data prove that a project actually did increase emissions, then the project will qualify as a major modification no matter how reasonable or thorough the operator's preconstruction projection may have been. By the same token, when post-construction data prove that emissions did not increase, then any quarrels with the operator's preconstruction predictions no longer matter. Real-world data do not suddenly become irrelevant just because it is the Government, not the operator, whose projections have proven mistaken.

2. This redefining of what constitutes an NSR-triggering change is problematic for the additional reason that it constitutes a clear departure from this Court's precedent and the consistent holdings from the Courts of Appeals regarding the primacy of actual emissions when evaluating whether a maintenance project triggers NSR.

In *Duke Energy*, this Court held that the 1980 NSR regulations were clear that NSR is triggered when actual annual emissions increase. 549 U.S. at 569, 577-78.

In *WEPCo*, the Seventh Circuit rejected the Government's contention that a major modification occurs when a unit's hypothetical maximum potential to emit is greater than its emissions in the baseline period. 893 F.2d at 916-18. This definition was too removed from the statutory and regulatory definition of modification, which must assess the unit's actual operations and impact on air quality.

And in *New York* v. *EPA*, 413 F.3d 3 (D.C. Cir. 2005) (*per curiam*), the D.C. Circuit rejected a regulatory definition of "major modification" that did not include an evaluation of whether the project caused an increase in emissions. The court observed that "the CAA unambiguously defines 'increases' in terms of actual emissions." *Id.* at 39. Thus, "the plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions." *Id.* at 40.

While the precise question presented differed among these cases, each emphasized that the trigger for statutory and regulatory NSR is whether the project causes an *actual* increase in emissions. In sharp contrast, the decision below allows a "major modifi-

cation" to be proven even in the conceded absence of an actual increase in emissions.

B. The Enforcement Regime the Sixth Circuit Has Created Violates Due Process.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fed. Commc'ns Comm'n* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citing *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). "A … punishment fails to comply with due process if the statute or regulation under which it is obtained … 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Id.* (quoting *United States* v. *Williams,* 553 U.S. 285, 304 (2008)). Thus, when an agency leaves a governing regulation vague, it cannot, consistent with due process, exploit that vagueness to establish a hitherto unpublished standard of liability.

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Christopher v. *SmithKline Beecham Corp.*, 567 U.S. 142, 158-59 (2012).

The Government's approach to enforcement here violates these principles. Specifically, it seeks to penalize DTE by proving that the projects at Monroe 2 were "major modifications" using an unpublished

projection methodology as its standard of liability—even when that methodology has proven incorrect. By endorsing this approach, the Sixth Circuit panel majority judges erred yet further.

The administrative history behind the regulations the Government relies upon only deepens the insult to due process. As detailed above, *supra* at 8-9, when EPA originally proposed the revisions to the NSR rules ultimately promulgated in 2002, the agency specifically considered doing away with the portion of the rule requiring that an increase be "caused" by a project because it did not include a specific methodology for applying it. But in the end, EPA not only kept the causation requirement, it expanded its availability. By 2007, EPA concluded that "[i]n most cases, it is unlikely that 'demand growth' emissions could ultimately be found to be related to changes made at a facility," and that the record-keeping and reporting requirements of the rule would be "sufficient … to verify post-project demand growth," and whether there is "ultimately … a significant emissions increase" caused by the project. 72 Fed. Reg. at 72,610-11.

EPA thus expressly recognized at the time of their adoption that the very provision in the regulations that the Government contends DTE misapplied is expressly designed to allow for a multiplicity of approaches in real-world application that may deviate from what the agency would choose. And rather than eliminate this potential for varying approaches as a means of regulatory control, it instead expressly adopted as a better means of insuring overall fidelity to the statute the record-keeping requirements that would provide the actual data necessary to demon-

strate whether a project did, in fact, cause a significant increase in emissions.

Thus, the ambiguity the Government would exploit here—a projection methodology that leaves room for operator judgment and differing results—is one the Government itself created and endorsed.

II. The Decision Below Will Chill Maintenance and Modernization of the Nation's Industrial Base.

1. Left standing, the decision below will have grave consequences. NSR applicability assessment is the gateway to improvement for major power plants and manufacturing facilities throughout the country. Yet, the ambiguity in the meaning of rules that govern the assessment of NSR applicability traps operators between the Scylla of lengthy and costly permitting and the Charybdis of arbitrary and unpredictable enforcement.

If an operator concludes that NSR does not apply, it avoids a costly, protracted, and uncertain permitting process. *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 516-17 (2004) (*Alaska DEC*) (Kennedy, J., dissenting) (noting that some companies "spend up to $500,000 on the permit process and ... the time for approval [for a complex project] can take from five to seven years"). But given the Orwellian approach to enforcement taken by the Government here—one that perversely would allow an operator that correctly projected that its maintenance project would not cause an emissions increase to be found liable for constructing a major modification without a permit—the operator proceeds with its project at its great peril.

That is all the more problematic given that the 2002 regulations were specifically designed to alleviate that very concern. In June of that year, EPA concluded in a report to President Bush that the unpredictability of the NSR program had "impeded or resulted in the cancellation of projects which would maintain and improve reliability, efficiency and safety of existing energy capacity. Such discouragement results in lost capacity, as well as lost opportunities to improve energy efficiency and reduce air pollution."[32]

That concern led to the 2002 reforms to the rules that the Sixth Circuit has misapplied here. The plain text of those revised rules confirms (a) that a project that does not cause a significant increase in emissions is not a major modification; and (b) that projections are subordinate to actual post-construction emissions when evaluating whether a major modification has occurred. Fairly applied, those rules give operators the certainty to undertake efficiency-improving projects with confidence; while they may not be able to predict the impacts of their projects with absolute certainty, at least they know that whether those projects trigger NRS will be controlled by real-world data, not by a "battle of experts" over whose predictions were better prepared. The decision below frustrates that objective, as it allows the Government, not the actual emissions with which Congress was concerned, to dictate what does or does not trigger NRS. Worse still, it would allow the Government to seek penalties for non-compliance

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[32] EPA, *New Source Review: Report to the President* at 1 (June 2002), https://www.epa.gov/sites/production/files/2015-08/documents/nsr_report_to_president.pdf (last visited July 28, 2017).

with standards that are "'notoriously unclear.'" Cf. *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring).

2. Recognizing the importance of clarity in this pervasive regulatory regime, this Court has not hesitated to intervene to resolve past ambiguities surrounding the CAA's NSR requirements. The Court should do so again, and restore the measure of certainty that the 2002 regulations were intended to provide to the countless operators impacted by NSR.

First, in 1972, the U.S. District Court for the District of Columbia issued a preliminary injunction ordering EPA to establish a PSD program. See *Sierra Club* v. *Ruckelshaus,* 344 F. Supp. 253 (D.D.C. 1972). The D.C. Circuit affirmed, without opinion. 4 Env't Rep. Cas. (BNA) 1815 (D.C. Cir. 1972). This Court granted certiorari and, without a written opinion, remanded the case to the District Court through a 4-4 decision. See *Fri* v. *Sierra Club,* 412 U.S. 541 (1973) (*per curiam*). The regulatory PSD program adopted in December 1974 resulted from that remand.

Second, industry challenged the 1974 PSD rules in the D.C. Circuit. The D.C. Circuit affirmed those rules in 1976. See *Sierra Club* v. *EPA,* 540 F.2d 1114 (D.C. Cir. 1976). This Court again granted certiorari to review the D.C. Circuit's decision. Before that case was decided, however, Congress in 1977 enacted the statutory PSD program, and the petition was dismissed without opinion. See *Montana Power Co.* v. *EPA,* 434 U.S. 809 (1977).

Third, when EPA in 1981 revised the rules governing NSR in nonattainment areas pursuant to the 1977 CAA, the Natural Resources Defense Council challenged those rules in the D.C. Circuit. The D.C.

Circuit vacated the rules and ordered EPA to adopt rules that would expand coverage of the nonattainment NSR program. This Court granted certiorari and reversed the D.C. Circuit. Highlighting the importance of actual emissions to NSR applicability, the Court affirmed EPA's nonattainment NSR "major modification" rule. EPA properly "exempt[ed] modifications of existing facilities [from NSR] that are accompanied by intrasource offsets so that there is no increase in emissions" [*i.e.*, no "major" modification]. *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 854 (1984) (quoting EPA's rulemaking description of the rule); see also *id.* at 840 (Under the "major modification" rule, a source "may install or modify one piece of equipment without meeting [NSR] ... if the alteration will not increase the total emissions from the plant.").

Fourth, in *Alaska DEC,* this Court granted certiorari to address EPA's authority to review state determinations under the PSD program. 540 U.S. at 469.[33] In his dissent, Justice Kennedy noted the central role of PSD in "Congress' design to grant States a significant stake in developing and enforcing" the CAA, and the substantial impacts of PSD on individual companies and the economy. *Id.* at 516, 517.

And of course, most recently, this Court granted certiorari to the Fourth Circuit to address whether the 1980 regulations could tolerate a definition of "modification" that was not based on an assessment

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[33] Although not central to its decision, the Court recognized that emissions *increases* are fundamental to the PSD program: "Modifications to major emitting facilities that increase nitrogen oxide emissions in excess of 40 tons per year require a PSD permit." *Alaska DEC*, 540 U.S. at 472.

of actual annual emissions. The Court concluded that it could not.[34]

As these decisions underscore, this is not an area in which ambiguity can be left to perisist. It is time yet again for this Court to step in and resolve the confusion created by the manifest errors of the court below with respect to the emissions increase provisions of the statute and the current (*i.e.*, 2002) NSR regulations. This issue bears upon all of American industry; it is of great importance to economic development in this country, at a time when the Nation is poised for evolution and expansion of its industrial capacity.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari.

[34] *Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561 (2007).

Respectfully submitted,

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July 31, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA (14-2274), *Plaintiff-Appellant*, SIERRA CLUB (14-2275), *Intervenor Plaintiff-Appellant*, *v.* DTE ENERGY COMPANY and DETROIT EDISON COMPANY, *Defendants-Appellees*.	>	Nos. 14-2274/2275

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:10-cv-13101—Bernard A. Friedman, District Judge.

Argued: December 10, 2015

Decided and Filed: January 10, 2017

Before: BATCHELDER, DAUGHTREY, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Thomas A. Benson, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellant. Mary Whittle, EARTHJUSTICE, Philadelphia, Pennsylvania, for Appellant Sierra Club. F. William Brownell, HUNTON & WILLIAMS LLP, Washington, D.C., for Appellees. **ON BRIEF:** Thomas A. Benson, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellant. Mary Whittle, Shannon Fisk, EARTHJUSTICE, Philadelphia, Pennsylvania, for Appellant Sierra Club. F. William Brownell, Mark B. Bierbower, Makram B. Jaber, HUNTON & WILLIAMS LLP, Washington, D.C., Brent A. Rosser, HUNTON & WILLIAMS LLP, Charlotte, North Carolina, Harry M. Johnson III, George P. Sibley III, HUNTON & WILLIAMS LLP, Richmond, Virginia, Michael J. Solo, DTE ENERGY COMPANY, Detroit, Michigan, for Appellees.

DAUGHTREY, J., delivered the opinion in which BATCHELDER, J., joined in the result. BATCHELDER, J. (pp. 9-14), delivered a separate opinion concurring in the judgment. ROGERS, J. (pp. 15-29), delivered a separate dissenting opinion.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. This case is before us for a second time, following an order of remand in *United States v. DTE Energy Co. (DTE I)*, 711 F.3d 643 (6th Cir. 2013). As we noted there, regulations under the Clean Air Act require a

utility seeking to modify a source of air pollutants to "make a preconstruction projection of whether and to what extent emissions from the source will increase following construction." *Id.* at 644. This projection then "determines whether the project constitutes a 'major modification' and thus requires a permit" prior to construction, as part of the Act's New Source Review (NSR) program. *Id.*; *see also* 42 U.S.C. §§ 7475, 7503; 40 C.F.R. § 52.21. The NSR regulations require an operator to "consider all relevant information" when estimating its post-project actual emissions but allow for the exclusion of any emissions "that an existing unit could have accommodated during the [baseline period] . . . and that are also unrelated to the particular project, including any increased utilization due to product demand growth." 40 C.F.R. § 52.21(b)(41)(ii)(a) and (c). An operator must document and explain its decision to exclude emissions from its projection as resulting from future "demand growth" and provide such information to the EPA or to the designated state regulatory agency. 40 C.F.R. § 52.21(r)(6)(i)—(ii).

Defendants DTE Energy Co. and its subsidiary, Detroit Edison Co. (collectively DTE), own and operate the largest coal-fired power plant in Michigan at their facility in Monroe, where, in 2010, DTE undertook a three-month-long overhaul of Unit 2 costing $65 million. On the day before it began construction, DTE submitted a notification to the Michigan Department of Environmental Quality stating that DTE predicted an increase in post-construction emissions 100 times greater than the minimum necessary to constitute a "major modification" and require a preconstruction permit.

DTE initially characterized the projects as routine maintenance, repair, and replacement activities, a designation that, if accurate, would exempt the projects from triggering NSR.[1] *See New York v. U.S. Envtl. Prot. Agency*, 443 F.3d 880, 883-84 (D.C. Cir. 2006). DTE also informed the state agency that it had excluded the entire predicted emissions increase from its projections of Unit 2's post-construction emissions based on "demand growth." This designation, if it could be established to the agency's satisfaction, also would have exempted DTE's modification from the necessity of a permit and, thus, allowed DTE to postpone some of the pollution-control installations that were planned as a future upgrade.[2] *See* 40 C.F.R. § 52.21(b)(41)(ii)(c). DTE began construction on Monroe Unit 2 without obtaining an NSR permit.

After investigation of DTE's projections, the EPA filed this enforcement action, challenging the company's routine-maintenance designation and its exclusion for "demand growth," and insisting that DTE should have secured a preconstruction permit and included pollution controls in the Unit 2 overhaul to remediate the projected emissions

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[1] As it turns out, the EPA does not consider a $65-million overhaul to be routine by definition.

[2] Those upgrades have since been completed. Since the Monroe Unit 2 overhaul was completed in 2010, DTE has installed the scrubbers and other pollution controls necessary to remediate toxic emissions at the facility, so that implementation is no longer at issue. Appellee's Br. at 13 n.4. But, if it is found to have violated the Act, DTE still could face monetary penalties and be required to mitigate excess emissions caused by the delay in installing pollution controls.

increases. The district court granted summary judgment to DTE, holding that the EPA's enforcement action was premature because the construction had not yet produced an actual increase in emissions. On appeal, we reversed and remanded, holding that the EPA was authorized to bring an enforcement action based on projected increases in emissions without first demonstrating that emissions actually had increased after the project. *DTE I*, 711 F.3d at 649.

On remand, the district court again entered summary judgment for DTE, this time focusing on language in our first opinion to the effect that "the regulations allow operators to undertake projects without having EPA second-guess their projections." *Id.* at 644. The district court apparently (and mistakenly) took this to mean that the EPA had to accept DTE's projections at face value, holding that:

> EPA is only entitled to conduct a *surface review* of a source operator's preconstruction projections to determine whether they comport with the letter of the law. Anything beyond this *cursory examination* would allow EPA to "second-guess" a source operator's calculations; an avenue which the Sixth Circuit explicitly foreclosed to regulators. [Emphasis added.]
>
> In this case, EPA claims that defendants improperly applied the demand growth exclusion when they "expected pollution from . . . Unit 2 to go up by thousands of tons each year after

> the overhaul," and then discounted this entire emissions increase by attributing it to additional consumer demand. In other words, EPA does not contend that defendants violated any of the agency's regulations when they computed the preconstruction emission projections from Unit 2. Rather, EPA takes defendants to task over *the extent* to which they relied upon the demand growth exclusion to justify their projections. This is exactly what the Sixth Circuit envisioned when it precluded EPA from second-guessing "the making of [preconstruction emission] projections." [Internal citations omitted.]

The problem with the district court's analysis is two-fold. First, the focus on so-called "second-guessing" is misplaced. That language from our earlier opinion is, technically speaking, *dictum*, because the holding of the opinion was, as noted above, that the EPA could bring a preconstruction enforcement action to challenge DTE's emissions projections. Second, in reviewing an operator's attribution of increased emissions to demand growth, the EPA definitely is not confined to a "surface review" or "cursory examination."

Indeed, two agency pronouncements, dating back to 1992, make clear that the EPA must engage in actual review. The first is in 57 Fed. Reg. 32,314, 32,327 (July 21, 1992), which is quoted in our first opinion: "[W]hether the [demand growth] exclusion applies 'is a *fact-dependent* determination that must

be *resolved on a case-by-case basis*.'" *DTE I*, 711 F.3d at 646 (emphasis added). The second is found in 72 Fed. Reg. 72,607, 72,611 (Dec. 21, 2007) (emphasis added): NSR record-keeping requirements "establish[] an adequate paper trail to allow enforcement authorities to *evaluate* [an operator's] claims concerning what amount of an emissions increase is related to the project and *what amount is attributable to demand growth*."

But the EPA cannot *evaluate* a *fact-dependent* claim on a *case-by-case* basis unless the operator supplies supporting facts, which the record establishes was not done here. In other words, a valid projection must consist of more than the following list, which is, in effect, all that DTE provided to the EPA:

Increase in nitrous oxide emissions..... 4,096 tons

Increase in sulfur dioxide emissions ... 3,701 tons

Total increase in emissions..... 7,797 tons

Less amount attributable to demand growth..... 7,797 tons

NSR projection for post-construction emissions ..... 0 tons

The record before us is devoid of any support for this thoroughly superficial calculation.[3] DTE baldly

[3] Clearly, DTE failed to comply with the regulation requiring it to "document . . . the amount of emissions excluded under paragraph (b)(41)(ii)(c) of this section and an explanation for why such amount was excluded." 40 C.F.R. § 52.21(r)(6)(i).

asserted that it was excluding from its projections "'that portion of the unit's emissions following the project that an existing unit could have accommodated . . . and that are also unrelated to the particular project,' including increases due to demand and market conditions or fuel quality." Mar. 12, 2010 Notice Letter, Page ID 165 (quoting the Michigan equivalent of 40 C.F.R. § 52.21(b)(41)(ii)(c)). DTE then went on to claim that "emissions and operations fluctuate year-to-year due to market conditions," and "[a]t some point in the future, baseline levels may be exceeded again, but not as a result of this outage." *Id*. This letter provided no rationale for the company's claim that Unit 2 was capable of accommodating the increased emissions prior to the construction projects or that future growth in the demand for electricity was the sole cause of the projected increase in pollutants. Although DTE later sent two more letters to the EPA supposedly clarifying the method of calculating baseline emissions, these letters also failed to explain why DTE applied the demand-growth exclusion to its entire projected-emissions increase. In its motion for summary judgment below, DTE claimed that it attributed the increased emissions to future demand for power "[b]ased on the company's business and engineering judgment" (Page ID 6716), but gave no specific information to support that judgment.

In fact, not one of DTE's attempts to justify its application of the demand-growth exclusion was supported by documentation, without which the EPA could not meaningfully evaluate DTE's projections. There was, in truth, nothing to evaluate. Moreover, the results of a computer model that DTE ran, when

it was rerun by the EPA, showed that DTE should actually have predicted a *decrease* in demand. (Page ID 372) Contrary to DTE's "business and engineering judgment," what did occur in the immediate post-construction period was a decline in consumer demand, not an increase. Appellee's Br. at 64.

DTE's failure to carry its burden to set out a factual basis for its demand-growth exclusion is just one problem with its projections. In order to exclude increased emissions as the product of increased demand under 40 C.F.R. § 52.21(b)(41)(ii), the company must establish (1) that the projected post-construction emissions could have been accommodated during the preconstruction period *and* (2) that the projected emissions are unrelated to the construction project.[4] As to the first requirement, DTE did not and could not establish that the increase in emissions could have been accommodated during the baseline period. Prior to the overhaul, DTE was running Unit 2 at full capacity—that is, Unit 2 was operating every hour that it could be operated. (Page ID 294) But Unit 2 was experiencing continual outages that kept it from running almost 20 percent of the time (Page ID 302), which is obviously why DTE shut it down for three months to

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[4] Both requirements must be met. *See New York v. U.S. Envtl. Prot. Agency*, 413 F.3d 3, 33 (D.C. Cir. 2005) (citing 67 Fed. Reg. 80,186, 80,203 (Dec. 31, 2002)) ("[E]ven if the operation of an emissions unit to meet a particular level of demand could have been accomplished during the representative baseline period, but it can be shown that the increase is related to the changes made to the unit, then the emissions increases resulting from the increased operation must be attributed to the modification project, and cannot be subtracted from the projection of post-change actual emissions.").

accomplish the overhaul, aimed at increasing efficiency and reliability. For the same reason, DTE did not and could not establish that the increase in emissions was unrelated to the construction process. The planned increase in efficiency and reliability would allow the plant to operate for at least an additional 12 days each year (Page ID 306), which in turn would result in increased emissions unless the construction also had included pollution controls, as the issuance of a permit would have required.

> In *DTE I*, we referenced the second sentence of 40 C.F.R. § 52.21(r)(6)(ii):
>
> If the emissions unit is an existing electric utility steam generating unit, before beginning actual construction, the owner or operator shall provide a copy of the information set out in paragraph (r)(6)(i). *Nothing in this paragraph (r)(6)(ii) shall be construed to require the owner or operator of such a unit to obtain any determination from the Administrator before beginning actual construction.*

711 F.3d at 650 (emphasis added). Judge Rogers's current dissent seems to take a broader view of this regulation than the text permits in repeatedly cautioning that permitting the EPA's enforcement action to go forward would create "a de facto prior approval system." (Rogers Opinion at 15, 17, 19) But this reading is patently too expansive, because the regulation does not say that the EPA has to accept projections at face value or that it is prohibited from questioning their legitimacy. Instead, and in context,

the rule means that once the required information has been submitted to the EPA for review, the operator does not have to delay construction until it receives a decision on the necessity of a permit, but may commence construction prior to a "determination from the Administrator." Of course, if the operator actually begins construction without waiting for a "determination" from the EPA and it later turns out that a permit was required, a violation of NSR has occurred, and the operator risks penalties and injunctive relief requiring mitigation of illegal emissions, a possible shut down of the unit, or a retrofit with pollution controls to meet emissions standards. *See, e.g., United States v. Cinergy Corp.*, 618 F. Supp. 2d 942, 971 (S.D. Ind. 2009), *rev'd on other grounds*, 623 F.3d 455 (7th Cir. 2010).

In short, DTE was not required by the regulations to secure the EPA's approval of the projections, or the project, before beginning construction, but in going forward without a permit, DTE proceeded at its own risk. The EPA is not prevented by law or by our prior opinion in *DTE I* from challenging DTE's preconstruction projections, such as they are. Viewing the facts in the light most favorable to the EPA, we conclude that there are genuine disputes of material fact that preclude summary judgment for DTE regarding DTE's compliance with NSR's statutory preconstruction requirements and with agency regulations implementing those provisions. Therefore, we REVERSE the district court's grant of summary judgment to DTE and REMAND this case for further proceedings consistent with this opinion.

In terms of the remand, it is important to note that the panel unanimously agrees—now that *DTE I*

is the law of this case and of the circuit—that actual post-construction emissions have no bearing on the question of whether DTE's preconstruction projections complied with the regulations. (Batchelder Concurrence at 6, 7; Rogers Opinion at 20) *DTE I* foreclosed that question in holding that an operator who begins construction without making a projection in accordance with the regulations is subject to enforcement, no matter what post-construction data later shows. 711 F.3d at 649. The district court erred initially and again on remand when it ruled that post-construction data could be used to show that a construction project was not a "major modification." Apparently, it is necessary to reiterate that the applicability of NSR must be determined *before construction commences* and that liability can attach if an operator proceeds to construction without complying with the preconstruction requirements in the regulations. Post-construction emissions data cannot prevent the EPA from challenging DTE's failure to comply with NSR's preconstruction requirements.

CONCURRENCE IN THE JUDGMENT

ALICE M. BATCHELDER, Circuit Judge, concurring in the judgment only. When this appeal was here before, the majority vacated a grant of summary judgment and remanded for the USEPA to challenge DTE's pre-construction emission projections. I dissented because actual events had disproven USEPA's projected (hypothetical) emissions calculations (which were the entire basis for its claim), USEPA had not accused DTE of any noncompliance with any regulations, and the majority opinion was creating a de facto prior-approval or second-guessing scheme. S*ee United States v DTE Energy Co.* (*DTE I*), 711 F.3d 643, 652-54 (6th Cir. 2013) (Batchelder, J., dissenting). On remand, however, the district court again granted summary judgment to DTE, finding that USEPA had not raised a valid claim of regulatory non-compliance and reasserting that actual events had disproven USEPA's hypothetical emission projections. USEPA appealed again, relying on the prior decision by the *DTE I* majority.

Therefore, this time around we again face the question of whether USEPA may second guess DTE's preconstruction emission projections, using its own hypothetical projections, without regard to actual events. The dissent here would affirm this grant of summary judgment on the basis that USEPA has not raised a valid claim of regulatory non-compliance and mere second guessing is impermissible. That was my view during the prior *DTE I* appeal, as

explained fully in that dissent, and I would very much like to agree. But, unlike the prior appeal, this appeal does not present an open issue and I cannot ignore the *DTE I* opinion or pretend that it means something other than what it says. Despite my continuing disagreement with it, *DTE I* is the law of the Sixth Circuit. Consequently, USEPA was entitled to rely on it and the district court was obliged to follow it. More importantly, we must follow it as well.

Simply put, the *DTE I* opinion clearly requires that we reverse the district court's grant of summary judgment to DTE and remand for reconsideration consistent with that prior opinion. Therefore, I concur in the judgment to REVERSE and REMAND, but I do not join any language or analysis in the lead opinion that could be read to expand the prior *DTE I* opinion.

I.

DTE Energy planned renovations at its Monroe Power Plant. In accordance with all applicable state and federal regulations, it conducted its own determination as to whether the renovations would constitute a "significant modification" that would require a PSD permit, and determined that it would not. Specifically, DTE relied on "demand growth" to predict that its post-project emissions would not increase from its baseline emissions levels and that there was no "reasonable possibility" that this renovation would be a significant modification.

But months later (after construction was well underway), USEPA sued DTE, claiming that—based on USEPA's expert's different hypothetical emission predictions—DTE should have gotten a PSD permit.

DTE moved for summary judgment, arguing that a PSD permit was unnecessary based on either its pre-construction prediction or actual post-construction test results, which established that emissions did not increase (and actually decreased) after the renovation. Basically, USEPA wanted DTE to go back in time and re-do its predictions the same way USEPA's expert would have done them, so as to predict emissions increases and mandate a PSD permit, even though actual events had already proven USEPA's predictions were wrong.

The pertinent regulations say: "a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase . . . and a significant net emissions increase. . . . The project is not a major modification if it does not cause a significant emissions increase. . . . Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv).[1] I read this last sentence also

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[1] In their entirety:

(a) Except as otherwise provided in paragraphs (a)(2)(v) and (vi) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, *a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase* (as defined in paragraph (b)(40) of this section), *and a significant net emissions increase* (as defined in paragraphs (b)(3) and (b)(23) of this section). *The project is not a major modification if it does not cause a significant emissions increase.* If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

to mean that, regardless of any pre-construction projections, a major modification *does not result* if the project *does not cause* an actual significant emissions increase or significant net emissions increase. But the *DTE I* panel majority did not read it this way, nor did USEPA. According to them, this regulation means that a renovation is a major modification (requiring a PSD permit) if either a USEPA-approved calculation predicts an emissions increase or emissions actually increase. And, despite the fact that the rules delegate calculation of the prediction to the operator (here DTE), and contain no requirement that the operator obtain USEPA review or approval, USEPA deems both the operator's prediction and reality meaningless if USEPA disagrees.

Leading in to *DTE I*, the district court had rejected USEPA's view and granted summary judgment to DTE in a thorough, well-written, and (I thought) correct opinion, explaining that DTE had followed the regulations and predicted no "significant modification," thus excusing it from the permit

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(b) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(iv)(c) through (f) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in paragraph (b)(3) of this section. *Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.*

40 C.F.R. § 52.21(a)(2)(iv) (emphasis added).

requirements. Moreover, actual events had proven DTE's prediction correct (and USEPA's incorrect). But, on appeal, the *DTE I* majority reversed, opining that: "[a] preconstruction projection is subject to an enforcement action by EPA to ensure that the projection [wa]s made pursuant to the requirements of the regulations." *DTE I*, 711 F.3d at 652.

I dissented on three bases. First, the subsequent actual emissions data, which showed an actual emissions *decrease*, "render[ed] moot the case or controversy about *pre*-construction emissions projections—there can be no permitting or reporting violation because there was, conclusively, no major modification." *Id.* (Batchelder, J., dissenting). Next, I explained that, regardless of any purported disclaimer that this was not a prior approval scheme, the reality is that "if the USEPA can challenge the operator's scientific preconstruction emissions projections in court—to obtain a preliminary injunction pending a court decision as to whether the operator or USEPA has calculated the projections correctly—that is the exact same thing as requiring prior approval." *Id.* at 653 (Batchelder, J., dissenting) (footnote omitted). Finally, I explained (twice) that USEPA was *not* claiming that DTE had failed to follow the regulations:

> To be sure, neither of these issues is in question here: there is no contention that DTE failed to prepare a projection (it did) or that DTE misread the rules in applying the governing regulation (it did not). Instead, USEPA relies on its expert's opinion to second-guess DTE's projections. *See* Appellant Br. at 25

> ("EPA can use its projections to demonstrate that the operator should have projected a PSD-triggering emissions increase."); 24 ("The agency can use its own emissions projections to demonstrate that a proper pre-construction analysis would have shown an emissions increase."). USEPA's disagreement is entirely technical and scientific; the dispute is not about the regulation.

Id. at 652 n.1 (Batchelder, J., dissenting).

> It bears repeating that USEPA does not contend that DTE failed to make a projection or failed to follow the regulations; rather, USEPA relies on its expert's opinion to second-guess DTE's technical/scientific projections. *See* n.1, *supra*. If the issue here had been one of the foregoing (i.e., if USEPA had wanted to challenge an operator's failure to make a projection or failure to follow the governing regulation—a challenge that would not require USEPA to rely on an expert's scientific opinion), that would present different considerations and perhaps result in a different outcome. Because neither of those issues is before us, it is neither necessary nor appropriate to address them here.

Id. at 652 n.2 (Batchelder, J., dissenting). If the *DTE I* holding had been that USEPA was limited to challenging only whether DTE had failed to follow the regulation, the *DTE I* majority would have had no basis for reversal, inasmuch as USEPA had not raised any such challenge. Instead, *DTE I*'s inescapable actual holding was that USEPA may use its own expert's pre-construction predictions to force DTE to get a PSD construction permit (or to punish DTE for failing to get a PSD permit), even if USEPA's disagreement is based on debatable scientific or technical reasons and even if actual events have proven USEPA's expert's prediction wrong.

On remand, however, the district court tried to limit the *DTE I* holding rather than just doing as instructed, and once again granted summary judgment to DTE, saying:

> In this case, EPA claims that defendants improperly applied the demand growth exclusion when they expected pollution from Unit 2 to go up by thousands of tons each year after the overhaul and then discounted this entire emissions increase by attributing it to additional consumer demand. In other words, EPA does not contend that defendants violated any of the agency's regulations when they computed the preconstruction emission projections from Unit 2. Rather, EPA takes defendants to task over *the extent* to which they relied upon the demand growth exclusion to justify their

> projections. This is exactly what the Sixth Circuit envisioned when it precluded EPA from second-guessing the making of preconstruction emission projections. Moreover, EPA does not point to any regulation requiring source operators to demonstrate the propriety of their demand growth exclusion calculations. And without adequate proof that defendants violated the regulations governing preconstruction emission projections, the instant action cannot withstand summary judgment.
>
> Even assuming that EPA's reviewing authority is as broad as the agency claims, the Court is bewildered by the prospect of what, if anything, the agency stands to gain by pursuing this litigation. Insofar as the government asserts that defendants misapplied the demand growth exclusion, this contention is belied by the fact that defendants have demonstrated, and the government concedes, that the actual post-project emissions from Unit 2 never increased. Therefore, since its own preconstruction emission projections are now verifiably inaccurate, the government is unable to show that the renovations to Unit 2 constituted a major modification.

R. 196 at 3-4; PgID 7515-16 (quotation marks, editorial marks, and citations omitted).

This analysis ignores two major holdings from *DTE I*. First, DTE had already established in *DTE I* that the actual post-project emissions had decreased, so even knowing that USEPA's pre-construction projections were "verifiably inaccurate," *DTE I* still remanded for a ruling on the *pre*-construction projections, rendering the actual emissions legally irrelevant. Second, we were also fully aware in *DTE I* that USEPA was not claiming that DTE had overlooked, misapplied, or violated any regulations; USEPA's only claim was that DTE had scientifically miscalculated the predicted emissions. If the question had been whether or not USEPA could challenge DTE's failure to comply with the regulations, then *DTE I* would have affirmed the summary judgment because USEPA had raised no such claim. And I would have had no need to dissent.[2] Rather, the *DTE I* majority remanded for a ruling on USEPA's claim that DTE had technically or scientifically miscalculated the hypothetical pre-construction emissions.

II.

Now, USEPA appeals the grant of summary judgment and argues that the district court did not follow the *DTE I* majority's remand instructions.

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[2] As I said in that dissent: "It bears repeating that USEPA does not contend that DTE failed to make a projection or failed to follow the regulations. . . . [I]f USEPA had wanted to challenge an operator's failure to make a projection or failure to follow the governing regulation. . . , that would present different considerations and perhaps result in a different outcome." *DTE I*, 711 F.3d at 652 n.2 (Batchelder, J., dissenting).

A.

On remand, USEPA re-framed its claims against DTE as noncompliance with particular regulations in an admitted effort to satisfy the *DTE I* majority's purported limiting language. That is, USEPA now argues that DTE violated the regulations "in two critical ways." Apt. Br. at 51. First, USEPA claims that DTE failed to base its predictions on "all relevant information," required by 40 C.F.R. § 52.21(b)(41)(ii)(a), and ignored its own modeling when claiming that any increase was due to demand increases, in violation of 40 C.F.R. § 52.21(b)(41)(ii)(a). Second, USEPA claims that, in applying the demand growth exclusion, DTE excluded emissions that USEPA believed were related to the project, contrary to § 52.21(b)(41)(ii)(c).

According to the *DTE I* opinion, this is a legitimate challenge. In fact, this is a far more legitimate challenge than that which the majority opinion condoned in the *DTE I* appeal. Given the *DTE I* holding, the district court erred by rejecting this challenge.

B.

USEPA also argues that "[w]here a source should have expected a project to increase emissions, the work is a major modification and must meet the modification requirements" regardless of "post-project data." Apt. Br. at 54. USEPA relies on the fact that the *DTE I* panel "knew that post-project data showed an emissions decrease, and yet ... remanded for further proceedings" anyway; if post-project data were determinative, "there would have

been no reason for that remand." Apt. Rep. Br. at 9-10. This reasoning actually applies throughout.

III.

Based on the foregoing, I conclude that, because we are bound by the *DTE I* opinion, we must reverse the grant of summary judgment to DTE and remand for reconsideration consistent with that prior opinion. Therefore, I concur in the judgment to REVERSE and REMAND. I do not join any language or analysis that expands or alters the prior opinion.

DISSENT

ROGERS, Circuit Judge, dissenting. The Clean Air Act requires an operator of a major source of air pollution to obtain a permit before beginning construction on a project that the operator predicts will significantly increase pollution at the operator's source. In 2010, EPA brought an enforcement action against DTE Energy Company and Detroit Edison Company, alleging that the defendants had violated the Clean Air Act by failing to obtain permits before beginning construction on projects at their power plant in Monroe, Michigan. DTE contended that EPA's enforcement action was premature because DTE's projects had not yet caused pollution to increase, and the district court agreed. On appeal, this court reversed the district court's grant of summary judgment to DTE, holding that EPA could bring an enforcement action to ensure that an operator performed a pre-construction projection about whether its proposed project would cause pollution to increase, but that full review of the validity of the projection at the pre-construction stage was not consistent with the statute and regulatory scheme. On remand, the district court granted DTE's renewed motion for summary judgment, reasoning that DTE met the basic requirements, and also because in any event post-construction emissions had not increased. EPA appeals.

Because the undisputed facts establish that DTE complied with the basic requirements of the

regulations for making projections, the district court properly granted summary judgment to DTE.

I.

A.

This court's prior opinion explains the regulatory framework that governs this case:

> The 1977 Amendments to the Clean Air Act created a program titled New Source Review. New Source Review forbids the construction of new sources of air pollution without a permit. 42 U.S.C. § 7475. In order to achieve the act's goals of "a proper balance between environmental controls and economic growth," sources already in existence when the program was implemented do not have to obtain a permit unless and until they are modified. *New York v. EPA*, 413 F.3d 3, 13 (D.C. Cir. 2005) (quoting 123 Cong. Rec. 27,076 (1977) (statement of Rep. Waxman)). Congress defined a modification as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). EPA requires owners or operators of [major stationary] sources to obtain permits if they plan a "major modification." [40 C.F.R. § 52.21(a)(2)(iii).] A [major

> stationary] source is anything that has the potential to emit large quantities of a regulated pollutant. [40 C.F.R § 52.21(b)(1)(i)(a).] A major modification is "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase . . . of a regulated [New Source Review] pollutant . . . and a significant net emissions increase of that pollutant from the major stationary source." 40 C.F.R. § 52.21(b)(2)(i).

United States v. DTE Energy Co., 711 F.3d 643, 644-45 (2013) (footnotes omitted).

The 2002 New Source Review rules,[1] as adopted by EPA in 2002, provide that for projects that only involve existing emissions units, a "significant emission increase of a regulated [New Source Review] pollutant is projected to occur if the sum of the difference between the projected actual emissions . . . and the baseline actual emissions . . . for each existing emissions unit, equals or exceeds the significant amount for that pollutant." 40 C.F.R. § 52.21(a)(2)(iv)(c). To determine whether a project would cause a significant emissions increase, and

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[1] New Source Review actually consists of two programs: "New Source Review for areas classified as 'nonattainment' for certain pollutants and Prevention of Significant Deterioration for areas classified as 'attainment.' Monroe, Michigan actually falls into both categories depending on the pollutant. The two programs are generally parallel and their differences do not affect this case." *DTE Energy*, 711 F.3d at 644 n.1.

thus require a permit, an operator must therefore follow three basic steps.

First, the operator must determine the "baseline actual emissions."

Second, the operator must determine the "projected actual emissions." The "projected actual emissions" can be calculated by determining "the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated [New Source Review] pollutant in any one of the 5 years (12–month period) following the date the unit resumes regular operation after the project." 40 C.F.R. § 52.21(b)(41)(i). To calculate this amount, the operator must "consider all relevant information, including but not limited to . . . the company's own representations, the company's expected business activity . . . [and] the company's filings with the State or Federal regulatory authorities." 40 C.F.R. § 52.21(b)(41)(ii)(a). Further, the operator "[s]hall exclude" from the projected actual emissions "that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24–month period used to establish the baseline actual emissions . . . and that are also unrelated to the particular project, including any increased utilization due to product demand growth." 40 C.F.R. § 52.21(b)(41)(ii)(c). "Since the most common independent factor is growth in demand for electricity, the exclusion [of this portion of the unit's emissions] is called the 'demand growth exclusion.'" *DTE Energy Co.*, 711 F.3d at 646.

Third, the operator must subtract the baseline actual emissions from the projected actual emissions to determine if the difference between these numbers

is "significant." 40 C.F.R. § 52.21(a)(2)(iv)(c). A table in the regulations defines the numeric thresholds that are considered "significant" for each regulated pollutant. 40 C.F.R. § 52.21(b)(23)(i). If the table defines the difference in the projected actual emissions and the baseline actual emissions to be significant, then the operator must obtain a permit before beginning construction on the project. 40 C.F.R. § 52.21(a)(2)(iii). "[A] permit would require the facility to use 'best available control technology' for each regulated pollutant. For grandfathered sources, installing this technology generally leads to a drastic decrease in emissions, even when compared to the preconstruction baseline, at great expense for the operator." *DTE Energy Co.*, 711 F.3d at 645 (citing 42 U.S.C. § 7475(a)(4)).

B.

Detroit Edison Company, a wholly-owned subsidiary of DTE Energy Company, owns and operates the Monroe Power Plant in Monroe, Michigan. In March 2010, DTE began construction projects at Monroe Unit #2, a coal-fired generating unit at the Monroe Power Plant. The projects included the replacement of several components of the unit's boiler tube, including the unit's economizer, pendant reheater, and a portion of the waterwall.

On March 12, 2010, before beginning these projects, DTE submitted calculations about the projects' expected impact on emissions to its reviewing authority, the Michigan Department of Environmental Quality. To make these calculations, DTE used projections that it had previously provided to the Michigan Public Service Commission. DTE

created these projections using a "complex 'production cost model' called PROMOD." PROMOD relies on "a number of company-defined inputs"—such as projected market prices for coal and natural gas and expected outage rates—to predict how much Monroe Unit #2 would be used in the future. DTE projected that in the five years after the projects, Monroe Unit #2 would have its maximum emissions of nitrogen oxide and sulfur dioxide in 2013, with emissions increases of 4,096 tons of nitrogen oxide and 3,701 tons of sulfur dioxide at this time. Both of these amounts are more than 40 tons per year increases of either sulfur dioxide or nitrogen oxide, increases which the regulations deem to be significant. 40 C.F.R. § 52.21(b)(23)(i).

However, DTE concluded that the projects would not result in an emissions increase. To reach this conclusion, DTE excluded all of its projected emissions increases from its "projected actual emissions" under the demand growth exclusion. DTE Vice President of Environmental Management and Resources Skiles W. Boyd stated that DTE determined that its projected increase in emissions was "attributable to demand growth" based on its "prediction that there would be substantial demand for electricity generated at DTE's coal-fired power plants in 2013 due to the predicted price of coal versus the price of natural gas and other factors." Boyd also stated that DTE concluded that it could have accommodated these emissions during the baseline period because Monroe Unit #2 "had greater availability during the baseline period than the highest expected utilization of the unit after the project."

On May 28, 2010, EPA sent DTE a letter asserting that its projects constituted a "major modification" and ordering DTE to produce "[a]ny additional information" that supported its contention that the projects did not require a permit. DTE responded on June 1, 2010, stating that its projected increases were "completely unrelated to the project." DTE explained that at the time that it made its projections "a primary driver for a projected increase in generation (and commensurate projected increase in emissions) from the Monroe Power Plant was an expected increase in power demand accompanied by an increase in energy cost." DTE stated that this "increase in power demand" led to "other factors" that influenced emissions. These factors included the fact that Monroe Unit #2 had no periodic outage scheduled in 2013, the year in which DTE projected that the unit would have its maximum emissions, while it had outages planned in 2010, 2012 and 2014. DTE explained that Monroe Unit #2 had no planned outage in 2013 in part because an outage was planned for Monroe Unit #1 in this year and "Monroe Unit 2 must help make up the difference in electricity demand." DTE also explained that it had determined that Monroe Unit #2 "could have generated" the projected increases in emission during the baseline period "had the market required the electricity during our baseline period."

The projects concluded on June 20, 2010. Since the projects were completed, emissions at Monroe Unit #2 have not exceeded pre-project emissions on an annualized basis, and actual emissions were less than baseline emissions in 2011 and 2012.

In June 2010, EPA issued DTE a notice of violation stating that the projects "resulted in a significant net emissions increase" and therefore constituted a "major modification" for which DTE was required to obtain a permit. In August 2010, the United States, acting at the request of EPA, filed a complaint against DTE in federal district court alleging that DTE had violated the Clean Air Act by proceeding to construction on a major modification without obtaining New Source Review permits. Soon after this, the district court ordered DTE not to use Monroe Unit #2 "to any extent that is greater than it was utilized" prior to the completion of the projects and granted Sierra Club's motion to intervene as plaintiffs. The district court subsequently granted DTE's motion for summary judgment, concluding that a determination of whether the projects at issue constituted a major modification was premature because EPA "may pursue [New Source Review] enforcement if and when post-construction monitoring shows a need to do so." The district court also rejected EPA's challenges to the procedural sufficiency of DTE's notice letter to the Michigan Department of Environmental Quality, holding that DTE complied with the Michigan state-law equivalent to the New Source Review reporting requirements.

On appeal, this court reversed, holding that while the "district court's premises are largely correct, they do not support its sweeping conclusion" that "preconstruction New Source Review enforcement is flatly unavailable if reporting requirements are met."

711 F.3d at 649.[2] This court explained that the current New Source Review regulations "take a middle road" between requiring "operators to defend every projection to the agency's satisfaction" and barring EPA from "challenging preconstruction projections that fail to follow regulations" by "trusting operators to make projections but giving them specific instructions to follow." *Id.* This court explained:

> The primary purpose of the projection is to determine the permitting, monitoring, and reporting requirements, so as to facilitate the agency's ability to ensure that emissions do not increase. If there is no projection, or the projection is made in contravention of the regulations guiding how the projection is to be made, then the system is not working. But if the agency can second-guess the making of the projections, then a project-and-report scheme would be transformed into a prior approval scheme. Contrary to the apparent arguments of the parties, neither of these is the case. Instead, at a basic level the operator has to make a projection in compliance with how the projections are to be made. But this does not mean that the agency gets in effect to require prior approval of the projections.

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[2] EPA did not appeal the district court's decision that DTE's notice complied with the reporting requirements. *DTE Energy,* 711 F.3d at 649.

Id.

This court reasoned that the Clean Air Act provides EPA with the ability to "take such measures . . . [that are] necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of [the Clean Air Act]." *Id.* at 650 (citing 42 U.S.C. § 7477). Because these requirements "include making projections," in accordance with the rules set forth in the regulations, this court concluded that "EPA's enforcement powers must also extend to ensuring that operators follow the requirements in making those projections." *Id.* EPA could, for instance, bring an enforcement action against an operator who commences construction on a project without making any preconstruction projection. *Id.* EPA could also prevent construction if an operator "uses an improper baseline period or uses the wrong number to determine whether a projected emissions increase is significant." *Id.* This court therefore held that a "preconstruction projection is subject to an enforcement action by EPA to ensure that the projection is made pursuant to the requirements of the regulations" and remanded the case to the district court. *Id.* at 652.

On remand, DTE again moved for summary judgment, arguing that the undisputed facts established that it had complied with the regulations' objective requirements for making preconstruction projections. The district court granted DTE's motion, concluding that this court's decision allows EPA to conduct only "a surface review of a source operator's preconstruction projection to determine whether they comport with

the letter of law." *United States v. DTE Energy Co.*, No. 10-cv-13101, 2014 WL 12601008, at *1 (E.D. Mich. Mar. 3, 2014). The district court explained that anything "beyond this cursory examination would allow the EPA" to engage in impermissible "second-guessing" of an operator's calculations. *Id.* The district court determined that EPA had not contended that DTE violated any of the agency's regulations when DTE made its projection but rather impermissibly challenged "*the extent* to which [DTE] relied upon the demand growth exclusion." *Id.* Accordingly, the district court held that EPA's enforcement action failed as a matter of law because there was not "adequate proof that [DTE] violated the regulations governing preconstruction emission projections." *Id.*

Alternatively, the district court held that even if EPA had unfettered authority to challenge the methodology and factual assumptions that DTE used to predict post-project emissions, the district court was "bewildered" by what EPA stood to gain by pursuing the litigation because "the actual post-project emissions from [Monroe] Unit 2 never increased." *Id.*, at *2. The district court explained that the actual post-project emissions established that EPA's "own preconstruction emission projections" were inaccurate and that EPA therefore could not show that DTE's projects constituted a major modification. *Id.*

II.

This court reviews the district court's partial grant of summary judgment to DTE *de novo*. *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623,

629 (6th Cir. 2002).[3] Summary judgment was proper because the undisputed facts establish that DTE complied with the basic requirements for making projections. *DTE Energy*, 711 F.3d at 649-50. EPA contends that it alleged that DTE failed to comply with the express regulatory requirements for making projections by: (1) failing to consider all relevant information when making its projection; (2) improperly applying the demand growth exclusion; and (3) failing to explain its use of the demand growth exclusion. In order to be excluded under the demand growth exclusion, an emissions increase must be unrelated to the operator's proposed project. 40 C.F.R. § 52.21(b)(41)(ii)(c). An emissions increase

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[3] Even though some of EPA and Sierra Club's claims against DTE have not been dismissed, this court has jurisdiction to review the district court's partial grant of summary judgment to DTE based on the district court's Rule 54(b) certification. A "district court may certify a partial grant of summary judgment for immediate appeal" under Federal Rule of Civil Procedure 54(b) "if the court expressly determines that there is no just reason for delay." *Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490, 500 (6th Cir. 2012). In certifying such a judgment, the district court must (1) "expressly direct the entry of final judgment as to one or more but fewer than all claims or parties in a case" and (2) "expressly determine that there is no just reason to delay appellate review." *Id.* (quoting *Gen. Acquisition, Inc. v. GenCorp., Inc.*, 23 F.3d 1022, 1026 (6th Cir. 1994)). The district court properly certified its 2014 grant of partial summary judgment to DTE for immediate appeal under Rule 54(b) because the district court entered final judgment on EPA's and Sierra Club's claims relating to DTE's 2010 construction projects at Monroe Unit #2. The remaining claims by EPA and Sierra Club involved DTE's completion of distinct, unrelated construction projects. Further, the district court did not abuse its discretion in concluding that there was no just reason to delay immediate appellate review of its grant of partial summary judgment.

is not related to the project if the increase is caused by growth in demand for electricity after the project is complete. *DTE Energy Co.*, 711 F.3d at 646. However, an emissions increase is related to the proposed project if the increase is caused by improved reliability, lower operating costs, or other improved operational characteristics of the unit after the project is complete. 61 Fed. Reg. 38,250, 38,268 (July 23, 1996). EPA claims that DTE excluded all of its predicted emissions under the demand growth exclusion even though DTE's computer modeling and project documents predicted that the operational improvements at Monroe Unit #2, rather than an increased demand for electricity, would cause these increased emissions. EPA therefore contends that DTE violated the express requirements of the regulations by excluding emissions that were related to DTE's proposed projects.

Contrary to EPA's contention, there is no genuine issue of material fact about whether DTE's projection complied with the basic requirements for making projections. EPA does not contend that DTE violated the regulations by failing to make any projection. Nor does EPA contend that DTE violated the basic requirements of the regulations. Rather, EPA questions: (1) DTE's interpretation of the relevant information; (2) the methodology that DTE used to reach its conclusion that its predicted emissions increase could be excluded under the demand growth exclusion; and (3) the adequacy of DTE's explanation of why it reached this conclusion.

First, there is not a genuine issue of material fact about whether DTE violated the basic requirements of the regulations by ignoring relevant information.

The regulations governing projections require an operator to "consider all relevant information" in determining its projected actual emissions, including but not limited to "the company's expected business activity" and "the company's filings with State or Federal regulatory authorities." 40 C.F.R. § 52.21(b)(41)(ii)(a). EPA claims that DTE ignored the relevant information because DTE created a "best estimate" computer model that reflected DTE's expected business activity and filings with a state regulatory authority but that DTE then ignored this model when it claimed that its predicted emissions increase was unrelated to its projects. EPA Br. at 39. To support this contention, EPA argues that running DTE's "best estimate" computer modeling with and without the changes caused by the projects showed that DTE's predicted emission increase would be caused by increased availability of Monroe Unit #2 after the projects were complete. *Id.* at 36-37. EPA claims that DTE ignored this modeling when claiming that its predicted increase was unrelated to the projects. EPA contends that DTE instead relied on its principal environmental engineer's "unsubstantiated" belief that a boiler tube component replacement project—like the economizer replacement at issue here—could not cause an emissions increase. *Id.* at 39.

This argument does not show that DTE violated the basic requirements of the regulations by failing to consider all relevant information. This claim is premised upon EPA's attempt to challenge the validity of DTE's conclusion that its predicted emissions increase was unrelated to its proposed projects. EPA does not contend that DTE failed to consider particular sources of relevant information

when it created its computer modeling because EPA agrees that DTE's projection was based on a "'sophisticated' computer model" that considered "'exhaustive' inputs." United States Br. at 13. Accordingly, EPA's complaint at bottom is not that DTE failed to consider all the relevant information. Rather, EPA contends that DTE must have misinterpreted the relevant information in order to conclude that its projected increase was unrelated to the projects. The regulations for making projections do not state that an operator must interpret relevant information in a certain way or arrive at certain conclusions after examining relevant information. Error in interpretation of information is not, in short, failure to consider information.

Similarly without merit is Sierra Club's contention that DTE violated the regulations by failing to consider a projection that DTE submitted to the Michigan Public Service Commission. Sierra Club Br. at 13-14. This projection, which was based upon the same PROMOD modeling that DTE used to make its preconstruction projection, projected lower annual system energy demand in each of the five years after the projects than in each of the five years before the projects. Sierra Club contends that DTE's projection that the demand would decline in its overall system is inconsistent with its projection that demand for Monroe Unit #2 would increase. Sierra Club Br. at 13-14. It is true that DTE's statement to EPA that the projected emissions increase at Monroe Unit #2 was due in part to an "an increase in demand for the system as a whole" appears to be inconsistent with DTE's projection to the Michigan Public Service Commission that its annual system energy demand would decrease after the projects

were complete. However, as stated above, DTE concluded that its projected increase in emissions at Monroe Unit #2 was due in part to the fact that this unit would need to generate more energy in 2013 to help make up for an extended outage of Monroe Unit #1 in 2013. DTE therefore could have projected that demand for energy at Monroe Unit #2 would increase in 2013, even if the demand for energy in DTE's overall system decreased. The Sierra Club therefore does not show that DTE failed to consider all relevant information in order to conclude that its projected emissions increase was unrelated to the projects.

Second, there is not a genuine issue of material fact about whether DTE followed the basic methodological requirements of the regulations when DTE excluded its predicted emissions increase under the demand growth exclusion. The demand growth exclusion provides that in making a preconstruction projection, an operator shall exclude the portion of the unit's emissions following the project that "could have [been] accommodated" during the baseline period and that are "unrelated to the particular project, including any increased utilization due to product demand growth." 40 C.F.R. § 52.21(b)(41)(ii)(c). EPA contends that DTE improperly applied the demand growth exclusion because DTE excluded all of its predicted emissions increase under this exclusion even though its computer modeling and project documents demonstrated that much of its predicted emissions increase was related to the projects. EPA Br. at 36-37; EPA Reply Br. at 24. To support this assertion, EPA relies on its expert witness Philip Hayet's opinion that an analysis of DTE's computer modeling

showed that Monroe Unit #2 would break down less after the projects were complete and would be able to generate more electricity and emissions. To reach this conclusion, Hayet used a "standard industry methodology" that ran DTE's model with and without the effects of the projects while keeping all other inputs the same. EPA also contends that, like DTE's computer modeling, DTE's project documents predicted that the Monroe Unit #2 would generate more electricity and pollution after the projects were complete because Monroe Unit #2 would break down less frequently. EPA Br. at 37.

However, EPA does not point to any rule in the regulations that establishes that DTE is required to perform Hayet's "standard industry methodology" in order to evaluate whether the predicted emissions could be excluded under the demand growth exclusion. Similarly, EPA does not point to any language in the regulations that establishes the weight that DTE is required to place on its project documents when determining whether predicted emissions can be excluded under the demand growth exclusion. EPA also does not point to language in the regulations that sets forth rules for how DTE should interpret its project documents.

The issue of whether the demand growth exclusion applies to an operator's predicted emissions increase "is a fact-dependent determination that must be resolved on a case-by-case basis." *DTE Energy*, 711 F.3d at 646 (quoting 57 Fed. Reg. 32,314, 32,327 (July 21, 1992)). Accordingly, requiring DTE to establish that its application of the exclusion was more reasonable than EPA's application of the exclusion would turn

New Source Review into a *de facto* prior approval scheme by requiring a district court to hold a trial to resolve this issue before the operator could proceed to construction. EPA therefore cannot show that DTE violated the regulations for applying the demand growth exclusion by contending that EPA would have applied this exclusion differently if EPA had been tasked with making the projection.

EPA also relies on EPA guidance about what it means for an emission to be "unrelated" to a project to support its argument that DTE violated the regulations by excluding a portion of DTE's projected emissions increase, which the regulations provide cannot be excluded. This reliance is misplaced. EPA repeatedly cites its statement that an increase in emissions must be "completely unrelated" to an operator's proposed project in order to be excluded under the demand growth exclusion. EPA Br. at 9, 28, 34-35. This statement does not provide operators with instructions about how to determine whether predicted emissions were completely unrelated to proposed projects. This statement also does not codify the methodology that EPA used to determine that DTE's predicted emissions increase was related to its proposed projects. Accordingly, this statement does not establish that DTE violated the regulations for applying the demand growth exclusion.

EPA's reliance on a statement in a preamble to proposed rulemaking from 1996 is similarly misplaced. In this preamble, EPA stated that when "the proposed change will increase reliability, lower operating costs, or improve other operational characteristics of the unit, increases in utilization that are projected to follow can and should be

attributable to the change." 61 Fed. Reg. 38,250, 38,268 (July 23, 1996). EPA seizes upon this language to contend that DTE's prediction that the projects would increase availability and reliability at Monroe Unit #2 is sufficient to establish that DTE's projected emissions increase was related to the projects. EPA Br. at 28, 37. This contention fails because EPA ignores its statement in the preamble that it "declined to create a presumption that every emissions increase that follows a change in efficiency . . . is inextricably linked to the efficiency change." 61 Fed. Reg. at 38,268.

Other EPA guidance also establishes that an emissions increase that follows a change in a unit's reliability or availability is not necessarily related to that change. In particular, in analyzing the 1992 New Source Review rules, EPA observed that "there is no specific test available for determining whether an emissions increase indeed results from an independent factor such as demand growth, versus factors relating to the change at the unit." 63 Fed. Reg. 39,857, 39,861 (July 24, 1998). The EPA therefore suggested not allowing operators to exclude "predicted capacity utilization increases due to demand growth from their predictions of future emissions." *Id.* However, EPA did not remove the demand growth exclusion. Instead, EPA kept the exclusion, recognizing that New Source Review record-keeping requirements establish "an adequate paper trail to allow enforcement authorities to evaluate [an operator's] claims concerning what amount of an emissions increase is related to the project and what amount is attributable to demand growth." 72 Fed. Reg. 72,607, 72,611 (Dec. 21, 2007).

Third, EPA's assertion that DTE violated the regulations by failing to properly explain why it excluded all of its projected emissions increases lacks merit. The regulations require an operator to "document and maintain a record of . . . the amount of emissions excluded" under the demand growth exclusion and "an explanation for why such amount was excluded" before beginning construction on a project. 40 C.F.R. § 52.21(r)(6)(i)(c). EPA contends that DTE violated this requirement by sending state regulators a letter that asserted that the demand growth exclusion applied to its predicted emissions increase without providing any factual support for this assertion. EPA Br. at 32-35.[4]

As the district court noted, although DTE's explanation of its use of the demand growth exclusion is not very detailed and "the accompanying table shows the results of the calculations without their back-up data, [EPA] does not point to any provision in [Michigan's equivalent to the New Source Review] rules requiring specificity beyond that which was provided." EPA also does not point to any regulation that describes the amount of detail that an operator is required to include in order to

[4] EPA contends that it did not allege that DTE had failed to comply with § 52.21(r)(6)(i)(c). EPA Reply Br. at 24 n.2. However, EPA claimed that DTE did not provide an "explanation" to support its exclusion of its projected emissions as required under § 52.21(r)(6)(i)(c) and claimed that DTE had not adequately supported its claim that the projected emissions increase could be excluded under the demand growth exception. EPA Br. at 32-35. Accordingly, EPA's allegation that DTE failed to adequately support its use of the demand growth exclusion appears to be based upon EPA's contention that DTE violated the requirement to provide an adequate explanation of its use of the demand growth exclusion under § 52.21(r)(6)(i)(c).

comply with the requirement to maintain an explanation of the operator's use of the demand growth exclusion. Allowing an enforcement action in this context would effectively turn the New Source Review into a *de facto* prior approval system.

EPA and Sierra Club's other arguments in support of allowing this enforcement action to continue are also unavailing. EPA contends that requiring it to defer to an operator's judgment about the projection itself and about whether the demand growth exclusion applies to the operator's predicted emissions increase would result in a voluntary New Source Review program for existing sources. To support this assertion, EPA claims that it will not be able to effectively evaluate potential increases in air pollution if the reasonableness of the projection and the applicability of the demand growth exclusion are "left to the source's unfettered discretion." EPA Reply Br. at 28. However, forbidding EPA from challenging an operator's projection on the basis that EPA would have used different methodology to create the projection or would have reached a different conclusion about whether the demand growth exclusion applied to the operator's predicted emissions increase is not equivalent to leaving the applicability of the demand growth exclusion and the making of the projection to the sole discretion of the operator. Rather, EPA can still challenge operators who fail to follow the basic requirements of the regulations by failing to make and record their preconstruction projections, by providing no explanation for their applications of the demand growth exception, or by excluding predicted emissions that the operators conclude are related to their projects.

EPA further contends that requiring it to defer to an operator's judgment about whether a predicted emissions increase can be excluded under the demand growth exclusion would require EPA to also defer to the operator's determination about whether an actual increase in emissions could be excluded under the demand growth exclusion. EPA Reply Br. at 28-29. This assertion is unavailing. This court's prior opinion did not foreclose EPA from challenging the reasonableness of an operator's determination that an actual post-construction increase in emissions was unrelated to the project. To the contrary, this court explained that "[a]n operator takes a major risk if it underestimates projected emissions" because the operator will face large penalties "[i]f post-construction emission are higher than preconstruction emissions, and the increase does not fall under the demand growth exclusion." *DTE Energy*, 711 F.3d at 651. Accordingly, this court's prior opinion indicates that EPA does not need to defer to an operator's determination about whether an actual increase in emissions after construction was related to the project.

EPA also contends that *Alaska Dep't of Envtl. Conservation v. EPA* establishes that EPA can also challenge the reasonableness of DTE's preconstruction projection. EPA Reply Br. at 21-23. This contention fails. In *Alaska Dep't*, the Supreme Court held that EPA can evaluate whether a state's imposition of pollution controls in an operator's permit was "reasonably moored to the [Clean Air] Act's provisions." 540 U.S. 451, 485, 488-90 (2004). Unlike DTE's projection, which was made before DTE decided whether it needed to obtain a permit, the pollution controls in *Alaska Dep't* were created

after the operator had independently concluded that it had to obtain a permit before beginning construction. *Id.* at 474-75. EPA's ability in *Alaska Dep't* to challenge the reasonableness of pollution controls included in a permit did not turn New Source Review into a *de facto* prior approval scheme by allowing EPA to "in effect . . . require prior approval of [an operator's] projections." *DTE Energy*, 711 F.3d at 649. *Alaska Dep't* is therefore inapposite.

EPA and Sierra Club also contend that EPA's enforcement action must be allowed to continue because a ruling in DTE's favor would harm public health and the economy. To support this assertion, EPA and Sierra Club explain that DTE's conclusion that it was not required to obtain a permit before beginning construction allowed it to delay installing updated pollution controls in Monroe Unit #2 for four years. Sierra Club Reply Br. at 21-21; EPA Br. at 53. EPA and Sierra Club contend that the increased pollution resulting from this delay resulted in "approximately 90 premature deaths and total social costs of $500 million" each year that the pollution controls were delayed. Sierra Club Reply Br. at 21; EPA Br. at 53-54. As this court previously explained, New Source Review is not designed to "force every source to eventually adopt modern emissions control technology." *DTE Energy*, 711 F.3d at 650. Accordingly, the fact that DTE was able to delay imposing updated pollution controls by "keep[ing] its post-construction emissions down in order to avoid the significant increases that would require a permit" is "entirely consistent with the statute and regulations." *Id.*

The district court relied additionally on the fact that post-project emissions did not actually increase. The underlying purpose of the statutory and regulatory scheme of permitting improvements that do not increase emissions therefore appears to have been met. However, because the undisputed facts establish that DTE complied with the basic requirements for making projections, I do not rely on the district court's alternative reason for granting summary judgment.

I would affirm the district court's judgment.

APPENDIX B

Nos. 14-2274/2275

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 01, 2017
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA (14-2274)	)	
Plaintiff-Appellant,	)	
SIERRA CLUB (14-2275),	)	
Intervenor Plaintiff-Appellant,	)	ORDER
v.	)	
DTE ENERGY COMPANY and DETROIT EDISON COMPANY,	)	
Defendants-Appellees.	)	

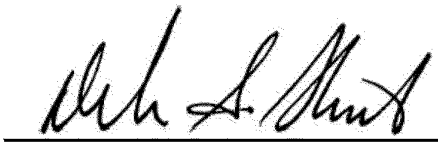
BEFORE: BATCHELDER, DAUGHTREY, and ROGERS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition

then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Rogers would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

APPENDIX C

Case No. 14-2274/14-2275

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA

Plaintiff-Appellant

v.

DTE ENERGY COMPANY;
DETROIT EDISON COMPANY

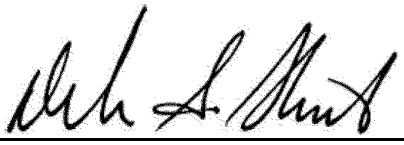
Defendants-Appellees

BEFORE: BATCHELDER, Circuit Judge; DAUGHTREY, Circuit Judge; ROGERS, Circuit Judge;

Upon consideration of motion to stay mandate,

It is **ORDERED** that the mandate be stayed to allow the appellees time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk



Issued: May 16, 2017

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA

Plaintiff,

and

SIERRA CLUB

Intervenor-plaintiff,

Civil Action No. 10-CV-13101
HON. BERNARD A. FRIEDMAN

vs.

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,

Defendants.
_____/

ORDER ENTERING PARTIAL FINAL JUDGMENT AND STAYING THE CASE PENDING APPEAL

Before the Court is the government's unopposed motion for entry of partial final judgment pursuant to Fed. R. Civ. P. 54(b) [docket entry 218]. Also before the Court is intervenor-plaintiff's motion seeking identical relief [docket entry 201] and defendants' motion to stay this matter pending appeal [docket entry 219]. The Court will rule on the

motions without oral argument pursuant to E.D. Mich. LR 7.1(f)(2).

In its March 3, 2014, order [docket entry 196] the Court granted defendants' motion for summary judgment on the ground that they had not violated EPA's regulations governing preconstruction emission projections when they renovated an electric utility steam generating unit ("Unit 2") at their Monroe, Michigan power plant without first obtaining a New Source Review ("NSR") permit from the Michigan Department of Environmental Quality ("MDEQ"). Thereafter, the Court allowed the government and intervenor-plaintiff to amend their complaints by adding claims regarding several other construction projects. Both the government and intervenor-plaintiff now seek immediate appellate review of the Court's March 3, 2014, order although the additional claims remain pending.

Rule 54(b) allows for "immediate review of certain district court orders prior to the ultimate disposition of a case." Gen. Acquisition, Inc. v. GenCorp., Inc., 23 F.3d 1022, 1026 (6th Cir. 1994). Certifying a judgment for appeal under Rule 54(b) is a two-step process. "First, the district court must expressly direct the entry of final judgment as to one or more but fewer than all the claims or parties in a case. Second, the district court must expressly determine that there is no just reason to delay appellate review." Id. (quotation marks and citations omitted). The second step requires district courts to evaluate the following nonexhaustive list of factors, namely:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for

> review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like.

Id. at 1030 (quoting Corrosioneering, Inc. v. Thyssen Envtl. Sys., Inc., 807 F.2d 1279, 1283 (6th Cir. 1986)). A district court must provide sufficient grounds for certifying an immediate appeal otherwise the Sixth Circuit Court of Appeals will not have jurisdiction to entertain the matter. See Adler v. Elk Glenn, LLC, No.14-5159, 2014 U.S. App. LEXIS 13044, at *1-4 (6th Cir. Jul. 10, 2014); Soliday v. Miami County, 55 F.3d 1158, 1163 (6th Cir. 1995).

With respect to the first step, the Court will enter final judgment solely on the NSR claim related to Unit 2. At the very least, this ruling leaves unresolved the outstanding claims associated with the construction projects at the Belle River Plant and the Trenton Channel Plant, neither of which "share a single aggregate of operative facts" with the Unit 2 NSR claim. GenCorp., Inc. v. Olin Corp., 390 F.3d 433, 442 (6th Cir. 2004) (quotation marks omitted).

As for the second step, the Court agrees with the parties that there is no just reason to delay

immediate appellate review. First, the Unit 2 NSR claim is separate and distinct from the unadjudicated claims. Second, it does not appear that the need for immediate appellate review would be obviated by further developments in this Court. Third, the Sixth Circuit would not be faced with the likelihood of considering the same issue again. In fact, partial judgment would provide the Sixth Circuit with the opportunity to further elucidate the legal standard this Court should use to evaluate defendants' compliance with the NSR regulations. Fourth, there is no claim or counterclaim of which this Court is aware that would result in a set-off against the judgment. And fifth, considerations of delay and judicial economy weigh in favor of certifying this matter for immediate appellate review. Such review would clarify the appropriate legal framework for determining whether defendants adhered to the NSR regulations, significantly narrow the legal an factual issues presented in any subsequent proceedings, and ultimately shorten the time and expense associated with a trial. Accordingly,

IT IS ORDERED that the government's unopposed motion for entry of partial final judgment is granted.

IT IS FURTHER ORDERED that intervenor-plaintiff's motion seeking identical relief is granted.

IT IS FURTHER ORDERED that defendants' motion to stay this matter pending appeal is granted.

S/ Bernard A. Friedman _____

BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT
JUDGE

Dated: August 5, 2014
Detroit, Michigan

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

UNITED STATES OF AMERICA,

Plaintiff

and

NATURAL RESOURCES DEFENSE COUNSEL, INC. AND SIERRA CLUB

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY and DETROIT EDISON COMPANY,

Defendants.

_____/

Civil Action No. 10-CV-13101

HON. BERNARD A. FRIEDMAN

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff United States of America (the "government") commenced this action pursuant to Sections 113(b) and 167 of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7413(b) and 7477. The complaint alleges that defendants Detroit Edison Company and DTE Energy Company (collectively "defendants") violated the CAA and the State Implementation Plan adopted by the State of Michigan and approved by the Environmental Protection Agency ("EPA"). Before the Court is defendants' renewed motion for summary judgment [docket entry 166]. The government and plaintiff-intervenor Sierra Club filed responses [docket entries 178 and 179]. Defendants filed a reply [docket entry 183]. The Court will rule on defendants' motion without oral argument pursuant to E.D. Mich. LR 7.1(f)(2).

At the outset, the Court incorporates its earlier summary of the underlying facts and description of the regulatory scheme at issue by reference to the opinion and order dated August 23, 2011 [docket entry 160].

This case is on remand from the Sixth Circuit Court of Appeals with instructions to evaluate whether defendants adhered to EPA's regulations governing preconstruction emission projections prior to renovating an electric utility steam generating unit ("Unit 2") at their Monroe, Michigan power plant without first obtaining a New Source Review ("NSR") permit from the Michigan Department of Environmental Quality ("MDEQ"). United States v. DTE Energy Co., 711 F.3d 643, 652 (6th Cir. 2013). The Court concludes that they have.

In its opinion, the Sixth Circuit held that "[a] preconstruction projection is subject to an

enforcement action by EPA to ensure that the projection is made pursuant to the requirements of the regulations." Id. This does not mean that EPA possesses unfettered authority to challenge the methodology and factual assumptions defendants' used to predict their post-project emissions. The Sixth Circuit merely requires that, "at a basic level," the source operator "has to make projections according to the requirements for such projections contained in the regulations." Id. at 649. A source operator, for example, may not simply commence construction on a project without having made any emissions projection. Nor may a source operator act contrary to the regulations by relying on an "improper baseline period or use[ ] the wrong number to determine whether a projected emissions increase is significant." Id. at 650. EPA is only entitled to conduct a surface review of a source operator's preconstruction projections to determine whether they comport with the letter of the law. Anything beyond this cursory examination would allow EPA to "second-guess" a source operator's calculations; an avenue which the Sixth Circuit explicitly foreclosed to regulators. Id. at 644 (stating that "the regulations allow operators to undertake projects without having EPA second-guess their projections . . .").

In this case, EPA claims that defendants improperly applied the demand growth exclusion when they "expected pollution from . . . Unit 2 to go up by thousands of tons each year after the overhaul," and then discounted this entire emissions increase by attributing it to additional consumer demand. Pl.'s Resp. at 15. In other words, EPA does not contend that defendants violated any of the

agency's regulations when they computed the preconstruction emission projections from Unit 2. Rather, EPA takes defendants to task over *the extent* to which they relied upon the demand growth exclusion to justify their projections. (Emphasis added). This is exactly what the Sixth Circuit envisioned when it precluded EPA from second-guessing "the making of [preconstruction emission] projections." DTE, 711 F.3d at 649. Moreover, EPA does not point to any regulation requiring source operators to demonstrate the propriety of their demand growth exclusion calculations. And without adequate proof that defendants violated the regulations governing preconstruction emission projections, the instant action cannot withstand summary judgment.

Even assuming that EPA's reviewing authority is as broad as the agency claims, the Court is bewildered by the prospect of what, if anything, the agency stands to gain by pursuing this litigation. Insofar as the government asserts that defendants misapplied the demand growth exclusion, this contention is belied by the fact that defendants have demonstrated, and the government concedes, that the actual post-project emissions from Unit 2 never increased. Pl.'s Mot. to Amend Comp. at 5. Therefore, since its own preconstruction emission projections are now verifiably inaccurate, the government is unable to show that the renovations to Unit 2 constituted a major modification.

This determination, however, does not permanently bar EPA from commencing an enforcement action against defendants on account of the Unit 2 renovations. As the Sixth Circuit noted in

its ruling, MDEQ retains "the authority to request emissions information from [the operator] at any time to determine the status of . . . post-change emissions," 67 Fed. Reg. 80,186, 80,204 (Dec. 31, 2002), and "EPA can bring an enforcement action whenever emissions increase, so long as the increase is traceable to the construction." DTE, 711 F.3d at 651 (citing 40 C.F.R. § 52.21(a)(2)(iv)(b)). Until that time, any EPA enforcement action related to the Unit 2 renovations would be premature. Accordingly,

IT IS ORDERED that defendants' motion for summary judgment is granted.

Dated: March 3, 2014
Detroit, Michigan

_s/ Bernard A. Friedman__
BERNARD A. FRIEDMAN
SENIOR UNITED
STATES DISTRICT
JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant*,		
		No. 11-2328
v.	>	
DTE ENERGY COMPANY; DETROIT EDISON COMPANY, *Defendants-Appellees*.		

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:10-cv-13101—Bernard A. Friedman,
District Judge.

Argued: November 27, 2012

Decided and Filed: March 28, 2013

Before: BATCHELDER, Chief Judge;
DAUGHTREY and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Thomas A. Benson, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. F. William Brownell, HUNTON & WILLIAMS LLP, Washington, D.C., for Appellees.

ON BRIEF: Thomas A. Benson, Sambhav N. Sankar, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. F. William Brownell, Mark B. Bierbower, Makram B. Jaber, HUNTON & WILLIAMS LLP, Washington, D.C., Harry M. Johnson III, George P. Sibley III, HUNTON & WILLIAMS LLP, Richmond, Virginia, Michael J. Solo, DTE ENERGY COMPANY, Detroit, Michigan, for Appellees. William L. Wehrum, HUNTON & WILLIAMS LLP, Washington, D.C., Jessie J. Rossman, NATURAL RESOURCES DEFENSE COUNCIL, Chicago, Illinois, for Amici Curiae.

ROGERS, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. BATCHELDER, C. J. (pp. 14–16), delivered a separate dissenting opinion.

OPINION

ROGERS, Circuit Judge. Environmental Protection Agency regulations implementing the Clean Air Act require owners and operators of any major pollutant emitting source who plan construction projects at the source to make a preconstruction projection of whether and to what extent emissions from the source will increase following construction. That projection determines whether the project constitutes a "major modification" and thus requires a permit. This appeal raises a single question: can EPA challenge that projection before there is post-construction data to prove or disprove it? The district court held that it cannot and granted summary judgment to

defendants DTE Energy and Detroit Edison. While the regulations allow operators to undertake projects without having EPA second-guess their projections, EPA is not categorically prevented from challenging even blatant violations of its regulations until long after modifications are made. The district court's sweeping reading of the regulations to that effect is at odds with the Clean Air Act. It is therefore necessary to reverse and remand.

I.

A.

The 1977 Amendments to the Clean Air Act created a program titled New Source Review.[1] New Source Review forbids the construction of new sources of air pollution without a permit. 42 U.S.C. § 7475. In order to achieve the act's goals of "a proper balance between environmental controls and economic growth," sources already in existence when the program was implemented do not have to obtain a permit unless and until they are modified. *New York v. EPA*, 413 F.3d 3, 13 (D.C. Cir. 2005) (quoting 123 Cong. Rec. 27,076 (1977) (statement of Rep. Waxman)). Congress defined a modification as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source

[1] New Source Review actually consists of two programs: Nonattainment New Source Review for areas classified as "nonattainment" for certain pollutants and Prevention of Significant Deterioration for areas classified as "attainment." Monroe, Michigan actually falls into both categories depending on the pollutant. The two programs are generally parallel and their differences do not affect this case.

or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). EPA requires owners or operators[2] of sources to obtain permits if they plan a "major modification." A source is anything that has the potential to emit large quantities of a regulated pollutant. A major modification is "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase . . . of a regulated [New Source Review] pollutant . . . and a significant net emissions increase of that pollutant from the major stationary source." 40 C.F.R. § 52.21(b)(2)(i). To determine whether an emissions increase is significant, an operator consults a chart included in the regulation. For example, an increase of forty tons per year of nitrogen oxides or sulfur dioxide is significant. *See id.* § 52.21(b)(23)(i). If the emissions increase is significant, the operator must obtain a permit. The permit would require the facility to use "best available control technology" for each regulated pollutant.[3] 42 U.S.C. § 7475(a)(4). For grandfathered sources, installing this technology generally leads to a drastic decrease in emissions, even when compared to the preconstruction baseline, at great expense for the operator.

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[2] This opinion will refer to both owners and operators as "operators." The same regulations apply to both.

[3] Best available control technology is the standard for areas in attainment. An operator seeking a permit in a nonattainment area must meet the most stringent performance standard contained in a state implementation plan or achievable in practice. This is called the "lowest achievable emissions rate." *See* 42 U.S.C. §§ 7501(3), 7503(a)(2).

In order to determine whether a proposed change would cause a significant emissions increase, and thus require a permit, an operator must project post-change emissions. Before 1992, EPA required operators to use a test called the "actual-to- potential test." That test requires operators to determine the maximum potential emissions of the source after the change and compare them to current emissions. If the difference is "significant," as defined by the chart, the change is considered a major modification. 40 C.F.R. § 52.21(a)(2)(iv)(d). However, the Seventh Circuit struck down that test as a requirement for power plants in *Wisconsin Electric Power Co. v. Reilly*, holding that it improperly relies on an assumption of continuous operations. 893 F.2d 901, 917 (7th Cir. 1990). Accordingly, EPA instituted a new test for power plants in 1992. The new test, called the "actual-to-future-actual" test, required operators to project the source's actual, instead of potential, emissions after the change. *See* 57 Fed. Reg. 32,314 (July 21, 1992). To ensure that the operators did not deliberately underestimate emissions to avoid the permit requirement, EPA required sources using this test to track their emissions for five years and provide to the reviewing authority, generally a state environmental agency, information demonstrating that the change did not result in an emissions increase. *Id.* at 32,325. Because the modification must be the cause of the emissions increase to qualify as a major modification, EPA allowed utilities to exclude from their calculations any increase in emissions caused by an independent factor. *Id.* at 32,326. Since the most common independent factor is growth in demand for electricity, the exclusion is called the "demand

growth exclusion." For the demand growth exclusion to apply, however, the pre-change source must have been able to accommodate the projected demand growth physically and legally. EPA noted that whether the exclusion applies "is a fact-dependent determination that must be resolved on a case-by-case basis." *Id.* at 32,327.

In 2002, EPA made more changes to the rule. EPA restored uniformity between utility and non-utility sources by allowing both to use an "actual-to-projected-actual" test. 67 Fed. Reg. 80,186, 80,191 (Dec. 31, 2002). EPA called this test "a sensible refinement of the rules [EPA] promulgated in 1992." *Id.* at 80,192. EPA noted that, for utilities, "[t]he effect of this consolidation is [to] make minor changes to the existing procedures." *Id.* One of these changes was that an operator "need only make and report a projection . . . when there is a reasonable possibility that the given project may result in a significant emissions increase." *Id.* However, utilities projecting post-change emissions of any kind would still have to submit their projections and post-construction tracked emissions to their reviewing authority. EPA stated that the changed recordkeeping and reporting requirements would allow reviewing authorities to assure that any changes sources make are consistent with Clean Air Act requirements. *See id.*

A number of states and environmental groups challenged the 2002 rule changes. The D.C. Circuit upheld most of the rule changes. However, the D.C. Circuit was not satisfied with the changes to the recordkeeping requirements. The court stated that "EPA has failed to explain how, absent

recordkeeping, it will be able to determine whether sources have accurately concluded that they have no 'reasonable possibility' of significantly increased emissions." *New York*, 413 F.3d at 34. The court further noted that sources could take advantage of the reasonable possibility standard to avoid recordkeeping altogether, thus thwarting EPA's ability to enforce the New Source Review provisions. *Id.* EPA argued that the methodology was enforceable because EPA has inherent enforcement authority allowing it to conduct inspections and request information. The D.C. Circuit acknowledged that EPA has such inherent enforcement authority, but noted that "even inherent authority depends on evidence." *Id.* at 35. The D.C. Circuit remanded to EPA to either provide an acceptable explanation for its reasonable possibility standard or to devise an appropriately supported alternative. *Id.* at 35–36.

EPA completed the remand rulemaking in 2007 by producing the set of regulations that govern this case. EPA answered the D.C. Circuit's concerns by defining the term "reasonable possibility." There is a reasonable possibility that a project that is not a major modification may result in a significant emissions increase if the operator projects, after applying the demand growth exclusion, an actual emissions increase of at least fifty percent of what the chart defines as significant. 40 C.F.R. § 52.21(r)(6)(vi)(a). An operator making such a projection must report it to the relevant reviewing authority. *Id.* § 52.21(r)(6)(ii). Furthermore, the operator must monitor the source's emissions for at least five—and in some cases ten—years after resuming normal operations and must report its findings to the reviewing authority. *Id.*

§ 52.21(r)(6)(iii)–(iv). If the operator projects an actual emissions increase of less than fifty percent of what is significant, it must remove the demand growth exclusion from its projections. If, ignoring the exclusion, the projected emissions increase then becomes at least fifty percent of what is significant, the source also falls under the recordkeeping requirement. *Id.* § 52.21(r)(6)(vi)(b). However, such a source does not fall under either the monitoring or reporting requirements described above. *Id.*

Therefore, under the current regulations, an operator seeking to determine whether a planned project requires a permit must take up to three steps. In step one, the operator calculates the unit's projected emissions. The operator then subtracts from that number the unit's current emissions and any emissions increase that qualifies for the demand growth exclusion. The resulting number is the projected emissions increase. The operator compares the projected emissions increase to the relevant number from the significance chart. If the projected emissions increase is greater, then the operator's inquiry is over and it must seek a permit from EPA or the relevant stage [sic] agency and install expensive modern pollution-control technology. If the projected emissions increase is lower, however, then the operator moves on to step two.

In step two, the operator cuts the significance number in half and compares the numbers again. If the projected emissions increase is now higher, the operator does not have to obtain a permit or install pollution-control technology, but must report its calculations to the relevant agency, monitor its emissions for at least five years, and report to the

relevant agency if its projections prove to have been too conservative. If the projected emissions increase is still lower, however, then the operator moves on to step three.

In step three, the operator adds back into its projected emissions increase any emissions it originally subtracted under the demand growth exclusion. The operator then compares the resulting number with half of the significance number. If the resulting number is higher, then the operator must maintain a record of its calculations. However, it does not have to obtain a permit, does not have to report anything to the relevant agency, and does not have to monitor future emissions. If the resulting number is still lower, however, the operator does not have to do anything and may destroy its records if it so chooses.

Whether a permit is ultimately required is a high stakes determination. If the operator needs to obtain a permit, the source loses grandfathered status under the Clean Air Act. This means the operator must install modern pollution controls such as flue gas desulfurization for sulfur dioxide and selective catalytic reduction for nitrogen oxides. These pollution controls lead to enormous emissions reductions. For example, EPA's expert estimated that installation of these modern pollution controls at DTE's Monroe Unit #2, the source at issue in this case, would reduce the plant's sulfur dioxide emissions by at least 95% and its nitrogen oxide emissions by at least 90%. However, installing these complex technologies is very expensive for operators. According to DTE, it is spending $1.7 billion to install these technologies at Monroe. *DTE Energy:*

Emissions Controls, http://www.dteenergy.com/dteEnergyCompany/environment/generation/controls.html (last visited Mar. 25, 2013).

B.

Detroit Edison owns and operates, and DTE operates, the Monroe Power Plant in Monroe, Michigan. In March 2010, DTE began a construction project at Monroe Unit #2. The project included replacing approximately 2,000 square feet of tubing, the economizer, and large sections of reheater piping; installing a new nine-ton exciter, a device that provides voltage that creates the electromagnetic field needed for the rotor to produce electricity; and refurbishing boiler feedwater pumps. The project required approximately 83 days, 600 construction workers, and $65 million. DTE performed the required emissions calculations and projected a post-project emissions increase of 3,701 tons per year of sulfur dioxide and 4,096 tons per year of nitrogen oxides. According to the regulations, an increase of 40 tons per year of either sulfur dioxide or nitrogen oxides is significant. 40 C.F.R. § 52.21(b)(23)(i). However, DTE determined that the entire emissions increase fell under the demand growth exclusion. DTE submitted these calculations to its reviewing authority, the Michigan Department of Environmental Quality, noting that DTE "continues to believe there is no reasonable possibility that the proposed project will result in a significant emissions increase and thus [notification, recordkeeping, and reporting] requirements do not apply." DTE then began the project. The Michigan Department of

Environmental Quality did not take any action in response to DTE's submission.

EPA learned of the construction project in May of 2010, two months after the project began. On June 4, 2010, EPA issued a notice of violation. The notice stated that the project "resulted in a significant net emissions increase" and therefore "constitutes a 'major modification.'" After attempts to resolve its disagreement with DTE without litigation failed, the United States filed a complaint against DTE and moved for a preliminary injunction. The district court denied the motion for a preliminary injunction. *United States v. DTE Energy Co.*, No. 10-13101 (E.D. Mich. Jan. 28, 2011). DTE then moved for summary judgment, arguing that because it satisfied the recordkeeping requirements, EPA could not bring a New Source Review enforcement action unless and until post-project emissions data demonstrated that DTE's projections were incorrect. The district court granted DTE's motion for summary judgment.

The District Court accepted DTE's argument, which the court characterized as follows:

> Defendants acknowledge that they did not obtain a pre-construction permit. They argue that they were not required to do so because they satisfied their obligations by projecting their post-construction emissions, determining that those projections did not indicate a major modification, reporting these projections to the Michigan Department of Environmental Quality through the submission of a "Notice Letter," and monitoring their emissions post-project.

> Defendants further argue that so long as certain pre-project requirements are met, [New Source Review] is triggered only if the project in question *causes* an emissions increase, which then demonstrates that the project is *per se* a "major modification." They acknowledge that based on emissions measurements which they have been taking since the project was completed, their project may eventually prove to be a "major modification." That determination, however, cannot be made until the completion of the first year for which such measurements are required. For this reason, Defendants argue that Plaintiff's only remedy, i.e. a post- construction enforcement action, is premature.

United States v. DTE Energy Co., No. 10-13101. 2011 WL 3706585, at *4 (E.D. Mich., Aug. 23, 2011). The court relied in this regard on

> the function of the 2002 [New Source Review] rules and Michigan's State Implementation Plan, which lessens the pre-construction burden on existing facilities so long as certain requirements are met. The 2002 [New Source Review] rules provide source operators such as Defendants with the option of either getting a permit before commencing their projects, or measuring their emissions afterward

> and running the risk of the Government bringing an enforcement action.

Id. The district court concluded that a determination of whether the projects at issue constitute a major modification is premature, *id.* at *5, because EPA "may pursue [New Source Review] enforcement if and when post-construction monitoring shows a need to do so." *Id.*

The court proceeded to reject EPA's challenges to the procedural sufficiency of DTE's notice, upholding both the timeliness and sufficiency of the information reported in the notice. These determinations of adequate reporting are not challenged on appeal. Instead, EPA challenges the district court's holding that preconstruction New Source Review enforcement is flatly unavailable if reporting requirements are met. Although the district court's premises are largely correct, they do not support its sweeping conclusion.

II.

Over several decades of regulation and litigation, EPA has created a system intended to protect air quality, conserve environmental agencies' scarce resources, and minimize costs for regulated industries. The system depends on operators' making accurate projections before embarking on construction projects. If operators had to defend every projection to the agency's satisfaction, companies would hesitate to make any changes, including those that may improve air quality. On the other hand, if EPA were barred from challenging preconstruction projections that fail to follow regulations, New Source Review would cease to be a

preconstruction review program. The 1992 and 2002 changes to New Source Review regulations take a middle road by trusting operators to make projections but giving them specific instructions to follow.

However, this scheme does not contemplate approval of the projection prior to construction. The primary purpose of the projection is to determine the permitting, monitoring, and reporting requirements, so as to facilitate the agency's ability to ensure that emissions do not increase. If there is no projection, or the projection is made in contravention of the regulations guiding how the projection is to be made, then the system is not working. But if the agency can second-guess the making of the projections, then a project-and-report scheme would be transformed into a prior approval scheme. Contrary to the apparent arguments of the parties, neither of these is the case. Instead, at a basic level the operator has to make a projection in compliance with how the projections are to be made. But this does not mean that the agency gets in effect to require prior approval of the projections.

The operator has to make projections according to the requirements for such projections contained in the regulations. If the operator does not do so, and proceeds to construction, it is subject to an enforcement proceeding. The district court in this case appears to have ruled, to the contrary, that no such proceeding is permitted until there is post-construction data. That is not correct. As the Supreme Court has stated, the Clean Air Act "lodge[s] in the Agency encompassing supervisory responsibility over the construction and modification

of pollutant emitting facilities in areas covered by the [New Source Review] program." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 484 (2004). The act's language is clear:

> The [EPA] shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part.

42 U.S.C. § 7477. These requirements include making projections. 40 C.F.R. § 52.21(a)(2)(iv)(b). They also instruct operators to consider all relevant information, specifically listing some considerations; to include emissions associated with startups, shutdowns, and malfunctions; and to exclude post-project emissions that could have been accommodated during the baseline period and are unrelated to the project. *See id.* § 52.21(b)(41)(ii). DTE conceded at oral argument that EPA could use its enforcement powers to force operators to make the projection. Oral Arg. at 30:25. EPA's enforcement powers must also extend to ensuring that operators follow the requirements in making those projections. EPA must be able to prevent construction if an operator, for example, uses an improper baseline period or uses the wrong number to determine whether a projected emissions increase is significant. As DTE stated at oral argument, "if [the operator] had misread the rules and used 400 [tons per year] instead of 40 [tons per year as the significance threshold], they would have filed an improper notification, an improper projection, and the agency

could then make them do the projection right." Oral Arg. at 31:00. If EPA did not have such power, the project-and-report scheme would not work because the reviewing agency would not have properly-done projections to compare with post-construction data.

On the other hand, EPA's briefs provide a basis for industry's concern that EPA is trying to impose an effective prior approval scheme. EPA repeatedly chastises DTE, for instance, for submitting its projection one day before construction began. *See* EPA Br. at 2, 12; Reply Br. at 3. However, this is fully consistent with a project-and-report scheme. Indeed, the regulation explicitly states: "Nothing in this paragraph (r)(6)(ii) shall be construed to require the owner or operator of [a utility] to obtain any determination from the Administrator before beginning actual construction." 40 C.F.R. § 52.21(r)(6)(ii).

EPA also repeatedly suggests bad faith on the part of an operator that intends to keep its post-construction emissions down in order to avoid the significant increases that would require a permit. *See* EPA Br. at 32–35, Reply Br. at 33–34. However, this is entirely consistent with the statute and regulations. The statute defines a modification as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). The regulations define a major modification as "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase . . . of a

regulated [New Source Review] pollutant . . . and a significant net emissions increase of that pollutant from the major stationary source." 40 C.F.R. § 52.21(b)(2)(i). These definitions are incompatible with EPA's argument that New Source Review is a program designed to force every source to eventually adopt modern emissions control technology. *See* EPA Br. at 4–5. As EPA conceded at oral argument, the statute and regulations allow sources to replace parts indefinitely without losing their grandfathered status so long as none of those changes cause an emissions increase. Oral Arg. at 19:08.

To the contrary, scholars have noted that New Source Review has given operators both the ability and the incentive to extend the life of existing sources instead of building replacements. *See* Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 Nw. U. L. Rev. 1677, 1708 (2007). As environmental groups point out in an *amicus* brief, many coal-fired power plants have been able to avoid installing modern pollution controls for 35 years. *See* NRDC Br. at 9. Several scholars have called for changes to New Source Review that would eliminate grandfathering. *See*, *e.g.*, Nash & Revesz, supra, at 1733; Shi-Ling Hsu, *What's Old Is New: The Problem with New Source Review*, Regulation Magazine, Spring 2006, at 36. It is Congress, not the EPA nor the courts, that has the power to make such changes.

A project-and-report scheme is entirely compatible with the statute's intent, which, as the EPA stated at oral argument, is "to prevent increases in air pollution." Oral Arg. at 19:40. If a company's

projections are later proven incorrect, EPA can bring an enforcement action. *See* 40 C.F.R. § 52.21(a)(2)(iv)(b). An operator takes a major risk if it underestimates projected emissions. If post-construction emissions are higher than preconstruction emissions, and the increase does not fall under the demand growth exclusion, the operator faces large fines and will have to undertake another project at the source to install modern pollution-control technology. Because undertaking a second project will almost certainly be more expensive than installing pollution-control technology at the time of the modification, operators have great incentives to make cautious projections.

EPA notes that DTE purposely manages the cost of electricity from Monroe Unit #2 to keep its emissions from increasing. Such actions further the goal of the statute. EPA warns, however, that after the five-year monitoring period is over, DTE could surreptitiously increase its emissions, having permanently avoided permitting for that change. *See* EPA Br. at 32–35, Reply Br. at 33–34. This scenario cannot pass. As EPA itself noted in the 2002 rulemaking, the Clean Air Act "provides ample authority to enforce the major [New Source Review] requirements if [a] physical or operational change results in a significant net emissions increase at [a] major stationary source." 67 Fed. Reg. at 80,204. Electric generation is one of the most highly-regulated industries in the country. Operators are responsible to state environmental agencies, EPA, and environmental groups, who are empowered to bring citizen suits under the Clean Air Act. "Moreover, [the operator's] reviewing authority has the authority to request emissions information from

[the operator] at any time to determine the status of [the source's] post-change emissions." *Id.* This monitoring makes it highly unlikely that an operator could escape permitting by waiting five years before increasing emissions. While EPA does presume that emissions increases after five years are unrelated to the project, *id.* at 80,197, that presumption can be overcome, for example, by demonstrating that the preconstruction facility could not handle such an increase. Neither the statute nor the regulations create a time barrier. EPA can bring an enforcement action whenever emissions increase, so long as the increase is traceable to the construction. *See* 40 C.F.R. § 52.21(a)(2)(iv)(b). In light of this, EPA's warnings ring hollow.

Our reversal does not constitute endorsement of EPA's suggestions. A preconstruction projection is subject to an enforcement action by EPA to ensure that the projection is made pursuant to the requirements of the regulations. The district court having ruled to the contrary, we must reverse and remand. But we make no determination as to whether defendants have complied with those projection regulations.

III

The district court's order is reversed, and this matter is remanded for further proceedings consistent with this opinion.

DISSENT

ALICE M. BATCHELDER, Chief Judge, dissenting. The majority holds that the USEPA may challenge the operator's preconstruction emissions projection, regardless of the actual emissions, and remands for USEPA to pursue such proceedings. While I agree with much of the majority opinion, I must ultimately dissent for the reasons that follow.

As a preliminary matter, I am uncomfortable with the majority's reliance on statements about the law made by counsel at oral argument. Four times during its analysis, the majority cites to a *legal premise* that one or another of the appellate attorneys "conceded" or "stated" at oral argument, at least two of which appear to be crucial concessions. *See* Maj. Op., *supra* ("that EPA could use its enforcement powers to force operators to make the projection," and that, if the operator "misread the rules," USEPA "could then make them do [an improper] projection right").[1] Given the enormity of this decision, and the effect it may have on every

[1] To be sure, neither of these issues is in question here: there is no contention that DTE failed to prepare a projection (it did) or that DTE misread the rules in applying the governing regulation (it did not). Instead, USEPA relies on its expert's opinion to second-guess DTE's projections. *See* Appellant Br. at 25 ("EPA can use its projections to demonstrate that the operator should have projected a PSD-triggering emissions increase."); 24 ("The agency can use its own emissions projections to demonstrate that a proper pre-construction analysis *would have shown* an emissions increase."). USEPA's disagreement is entirely technical and scientific; the dispute is not about the regulation.

stationary source operator in the Sixth Circuit if not beyond, it would be useful to have a citation to a statute, a regulation, or a case — something more substantive than one advocate's extemporaneous comments at appellate oral argument.

But if we are going to rely on statements by counsel, there is a statement by counsel on appeal, concerning a *fact* specific to this case, that is even more important to the outcome of this decision. In its appellate brief, DTE's counsel wrote:

> And although not part of the record here, Detroit Edison can represent that it submitted to MDEQ a postconstruction annual emissions report pursuant to Mich. Admin. Code R. 336.2818(3)(d) on February 28, 2012, and that report shows no increase in annual emissions at Monroe Unit 2 for the first full calendar year following the project. In fact, that report shows substantially lower emissions from Monroe Unit 2 during 2011 than the unit's emissions before the projects.

Appellee Br. at 25-26. If true, this fact renders moot the case or controversy about *pre*-construction emissions projections — there can be no permitting or reporting violation because there was, conclusively, no major modification. *See* 40 C.F.R. § 52.21(a)(2)(iv)(b) ("Regardless of any . . . preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase."); Mich. Admin. Code R. 336.2802(4)(b). This project

caused no emissions increase and, in fact, resulted in an emissions decrease. All of which begs the question: what exactly does the majority anticipate the district court will do with this on remand? Allow the USEPA to challenge preconstruction projections that actual events have already proven correct? I would hold that these subsequent actual results render the present dispute moot.

Finally, even if this were not moot (or if it were appropriate for us to provide advisory opinions on moot questions), I still could not join the majority opinion because I find it logically flawed and, correspondingly, legally incorrect. The majority holds, on the one hand, that this scheme "does not contemplate [USEPA] approval of the projection prior to construction," and "if the agency can second-guess the making of the projections, then a project-and-report scheme would be transformed into a prior approval scheme," which the majority rejects: "this does not mean that the agency gets in effect to require prior approval of the projections." Maj. Op., *supra*. I agree entirely.

But then the majority immediately, directly, and — at least to me — inexplicably contradicts itself, holding that the USEPA can initiate enforcement proceedings to challenge the operator's projections: "The operator has to make projections according to the requirements for such projections contained in the regulations.[2] If the operator does not do so, and

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[2] It bears repeating that USEPA does not contend that DTE failed to make a projection or failed to follow the regulations; rather, USEPA relies on its expert's opinion to second-guess DTE's technical/scientific projections. *See* n.1, *supra*. If the issue here had been one of the foregoing (i.e., if USEPA had

proceeds to construction, it is subject to an enforcement proceeding." Maj. Op., *supra*. The majority ultimately holds that USEPA must be able to challenge the accuracy of the operator's scientific or technical preconstruction projections and remands the case for renewed (further) proceedings in the district court on that basis. Let us be very clear, if the USEPA can challenge the operator's scientific preconstruction emissions projections in court — to obtain a preliminary injunction pending a court decision as to whether the operator or USEPA has calculated the projections correctly[3] — that is the exact same thing as requiring prior approval. Put the other way, under a prior-approval scheme, if USEPA disagreed with the projections and forbid construction on that basis, the operator would have to go to the court for a final decision on the projections.[4] The only difference between the scheme that majority endorses and the prior-approval scheme (that the majority purports to reject) is which

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wanted to challenge an operator's failure to make a projection or failure to follow the governing regulation — a challenge that would *not* require USEPA to rely on an expert's scientific opinion), that would present different considerations and perhaps result in a different outcome. Because neither of those issues is before us, it is neither necessary nor appropriate to address them here.

[3] The relief that USEPA sought in the district court was an injunction to stop the construction.

[4] Put yet another way, a preliminary injunction is only a viable remedy if this is a *de facto* prior-approval scheme. If prior approval were not necessary, there would be no place for a preliminary injunction to uphold construction.

party is the plaintiff and which the defendant. Otherwise, it is identical.

For the forgoing reasons, I would be inclined to dismiss this appeal as moot. Barring that, I would affirm the judgment of the district court. In either event, I must respectfully dissent.

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

UNITED STATES OF AMERICA, Plaintiff, and NATURAL RESOURCES DEFENSE COUNSEL, INC. AND SIERRA CLUB Intervenor-Plaintiffs, v. DTE ENERGY COMPANY and DETROIT EDISON COMPANY, Defendants. _____/	Civil Action No. 10-13101 HON. BERNARD A. FRIEDMAN

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. Introduction

This matter is before the Court on Defendants' motion for summary judgment. Plaintiff filed a response, and Defendants filed a reply. Pursuant to E.D. Mich. L.R. 7.1(f)(2), the Court will decide this motion without oral argument.

Plaintiff United States of America ("Plaintiff" or "Government") commenced this action pursuant to Sections 113(b) and 167 of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7413(b) and 7477. The complaint alleges that Defendants Detroit Edison Company and DTE Energy Company (collectively, "Detroit Edison" or "Defendants") have violated the CAA and the State Implementation Plan adopted by the State of Michigan and approved by the Environmental Protection Agency ("EPA").[1] The pivotal issue in this case is whether Defendants violated the CAA by renovating electric utility steam generating units ("units") at their Monroe, Michigan power plant without first obtaining a New Source Review ("NSR") permit from the Michigan Department of

[1] Pursuant to Section 109 of the CAA, 42 U.S.C. § 7409, the EPA must establish national ambient air quality standards that specify the maximum permissible concentration of air pollutants in different areas of the country. Section 110 of the CAA, 42 U.S.C. § 7410, requires states to meet the EPA's national ambient air quality standards by developing State Implementation Plans, which impose regulatory requirements on individual sources of air pollution, including electric power generating plants. The State Implementation Plans are subject to EPA approval, and once approved, they are federally enforceable. *See* 42 U.S.C. § 7413(a), (b). Michigan has incorporated the federal standards into its State Implementation Plan. *See* Mich. Admin. Code R. 336.2801, *et seq*.

Environmental Quality.[2] Plaintiff contends that such a permit was required because the renovations constituted a "major modification" of the subject units. Defendants contend that no such permit was required, and that they are therefore entitled to summary judgment because they abided by their statutory and regulatory obligations. For the reasons discussed below, the Court shall grant Defendants' motion.

II. Standard of Review

Summary judgment is proper where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. In considering a motion for summary judgment, the Court will construe all facts in a light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). There are no genuine issues of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Id. If the movant carries its burden of showing an absence of evidence to support a claim, then the nonmovant must demonstrate by affidavits, depositions, answers to interrogatories, and admissions that a genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 324-325 (1986).

III. The Clean Air Act and New Source Review

Defendants own and/or operate several power plants, including a plant in Monroe, Michigan. The Monroe power plant includes four units. It is a

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[2] Such renovations are referred to as "projects" throughout the relevant statutes and regulations. "Pre-construction" work is work done in preparation for the projects at issue.

"major emitting facility" under the CAA, 42 U.S.C. § 7479(l), and a "major emitting source" under the CAA and Michigan's State Implementation Plan. As such, the CAA and Michigan's State Implementation Plan regulate most projects undertaken at the Monroe power plant, including the projects at issue in this case.

The CAA was enacted "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1); Nat'l Parks Conservation Ass'n, Inc. v. Tenn. Valley Auth., 480 F.3d 410, 412 (6th Cir. 2007). Section 165 of the CAA states that no unit, or major emitting facility, may be constructed unless, among other requirements, the owner or operator obtains a permit prior to construction. *See* 42 U.S.C. § 7475.

In 1977 Congress amended the CAA and added requirements pertaining to the construction and/or modification of power "sources,"[3] including units such as those at Defendants' Monroe power plant. Congress "grandfathered' existing sources, so that they have to comply with the requirements only when "major modifications" to the sources are contemplated. The new rules, known as New Source Review, require an owner or operator of a source ("source operator") to, among other things, obtain a construction permit and install appropriate pollution

[3] A "source" is any building, structure, facility, or installation which emits or may emit a regulated new source review pollutant. Mich. Admin. Code R. 336.2801(ss). The parties agree that the Monroe units at issue are "sources," as defined at Mich. Admin. Code R. 336.2901(t).

controls prior to commencing construction of a major modification to a power source.

Whether the NSR rules apply depends on whether the project in question constitutes a "major modification." A major modification is defined as a physical change at a major stationary source or a change in the method of operation that results in a significant net emissions increase.[4] 42 U.S.C. §§ 7470-7492; Mich. Admin. Code R. 336.2801-336.2830. The 2002 NSR rules, as adopted by the EPA in 2002 and incorporated into the Michigan State Implementation Plan, state that a project is a major modification for a regulated pollutant "if it causes both . . . [a]significant emissions increase [and] [a] significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv); Mich. Admin. Code R. 336.2802(4)(a). A project "is not a major modification if it does not cause a significant emissions increase." Id.

A utility company contemplating a major modification, and thus bringing the project within NSR governance, must obtain a permit before beginning construction. *See* 40 C.F.R. § 52.21(a)(2)(iii); Mich. Admin. Code R. 336.2802(3). If a project constitutes a major modification, a source operator is required to obtain a permit, install pollution controls, and meet other requirements before beginning the work. *See, e.g.*, 42 U.S.C. §§ 7475(a), 7503(a). Accordingly, NSR applicability must be determined before a source operator begins work so that a permit, if needed, may be obtained.

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[4] Mich. Admin. Code R. 336.2801(ee) provides the standard for calculating whether a "net emissions increase" has occurred.

See United States v. Ohio Edison Co., 276 F. Supp. 2d 829, 881 (S.D. Ohio 2003).

As a result of the 2002 NSR changes, if a source operator determines that its project does not constitute a major modification, it may commence its project without an NSR permit subject to certain post-project emissions monitoring requirements. *See* Mich. Admin. Code R. 336.2902. Source operators that anticipate post-project emissions, but do not anticipate that their project will constitute a major modification, must submit a copy of their projections to the appropriate reviewing authority, which in this matter is the Michigan Department of Environmental Quality. *See* Mich. Admin. Code R. 336.2818. Once the source operator submits such projections, it need not obtain an NSR permit before beginning construction. *See* Mich. Admin. Code R. 336.2902(6)(b).

After the project is completed, the source operator must monitor the emissions that could increase as a result of the project. The source operator must also maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of five years. *See* Mich. Admin. Code R. 336.2902(6)(c).

The source operator's post-project data allows the Michigan Department of Environmental Quality to determine whether a major modification has taken place. "Regardless of any . . . preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(b); Mich. Admin. Code R. 336.2802(4)(b). If the post-project data show an emissions increase resulting from the project, then

the project is considered to have been a major modification, and the regulating authorities may pursue a post-project enforcement action. *See* Mich. Admin. Code R. 336.2802(4).

As the EPA has explained, post-project monitoring "provide[s] a reasonable means of determining whether a significant increase . . . resulting from a proposed change . . . occurs within 5 years following the change." 57 Fed. Reg. at 32,325. If the Michigan Department of Environmental Quality "determines that the source's emissions have in fact increased significantly over baseline levels as a result of the change, the source would become subject to NSR requirements at that time," including the requirement of a post-project permit and a possible enforcement action. Id.

Pursuant to the 2002 NSR rules, source operators must abide by specific pre- and post-project obligations, referred to in the energy industry as "source obligations," that prescribe a procedure for complying with the above-described NSR program. A source operator's first "source obligation" regards situations in which there is a reasonable possibility that a project that is not part of a major modification may still result in a significant emissions increase of a regulated pollutant, and the source operator elects to use the method specified in Mich. Admin. Code R. 336.2801(ll)[5] for calculating projected actual

[5] In determining the projected actual emissions pursuant to Mich. Admin. Code R. 336.2801(ll), before beginning actual construction, the source operator must (a) consider historical operational data including business projections; (b) include emissions, including fugitive emissions and emissions associated with startups, shutdowns and malfunctions; and (c)

emissions. In such a case, the source operator must gather specifically required information.[6] The source operator must then provide notice of its projection to the regulating authority, which in this matter is the Michigan Department of Environmental Quality. *See* Id. Following such notice, the operator need not wait for additional authorization from the Michigan Department of Environmental Quality, and may commence construction without an NSR permit in full compliance with the CAA. *See* Mich. Admin. Code R. 336.2818(3)(b).

The second "source obligation" is a post-project matter. When construction of the project is completed and regular plant operations resume, the source operator must monitor the emissions of any regulated pollutant that could increase as a result of the project for five to ten years.[7] *See* Mich. Admin.

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exclude emissions that are unrelated to the project, that could have been accommodated during the period used to establish baseline actual emissions, and that are due to product demand growth.

[6] Such information includes (1) a description of the project; (2) identification of the emissions unit or units whose emissions of a regulated new major source review pollutant may be affected by the project; and (3) a description of the applicability test used to determine that the project is not a major modification for any regulated new source review pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded, an explanation for why such amount was excluded, and any netting calculations, if applicable. Mich. Admin. Code R. 336.2818(3).

[7] The operator must measure the annual emissions for five years following resumption of regular operations after the change, or for ten years following resumption of regular operations after the change if the project increases the design

Code R. 336.2818(3). For the type of units at issue in the instant matter, the source operator must submit a report to the Michigan Department of Environmental Quality within 60 days after the end of each calendar year following the project's completion, setting out each unit's annual emissions during the previous calendar year. *See* Mich. Admin. Code R. 336.2818(3). If the emissions increase, then the project is evaluated to see if a "major modification" and possible NSR violation has occurred. *See* Mich. Admin. Code R. 336.2818(3).

IV. Facts

In March 2010, the Defendants halted operations at some of their Monroe, Michigan power plant units to perform work that Defendants contend was maintenance work. On March 12, 2010, Defendants mailed a "pre-project notification" letter, also referred to as a "Notice Letter," to the Michigan Department of Environmental Quality, informing the agency of the projects at issue. The Notice Letter predicted an annual post-project emissions increase, but asserted that the emissions increase was unrelated to the projects. The Michigan Department of Environmental Quality did not question Defendants' notification.

The power-plant outages necessary to commence the projects began at 1:30 a.m. on March 13, 2010. The projects concluded on June 20, 2010, and the affected units resumed regular operations later that summer.

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capacity or potential to emit the regulated pollutant(s). Mich. Admin. Code R. 336.2818(3).

Following completion of the projects, Defendants began ongoing post-construction emissions monitoring.

V. Analysis

Plaintiff argues that NSR is meant to serve as a pre-construction review program. Plaintiff contends that Defendants were required to obtain a permit from the Michigan Department of Environmental Quality prior to construction, because their projects constituted a major modification to the units at issue. In addition, Plaintiff argues that Defendants' Notice Letter was untimely and that its content was insufficient.

Defendants acknowledge that they did not obtain a pre-construction permit. They argue that they were not required to do so because they satisfied their obligations by projecting their post-construction emissions, determining that those projections did not indicate a major modification, reporting these projections to the Michigan Department of Environmental Quality through the submission of a "Notice Letter," and monitoring their emissions post-project. Defendants further argue that so long as certain pre-project requirements are met, NSR is triggered only if the project in question *causes* an emissions increase, which then demonstrates that the project is *per se* a "major modification." They acknowledge that based on emissions measurements which they have been taking since the project was completed, their project may eventually prove to be a "major modification." That determination, however, cannot be made until the completion of the first year for which such measurements are required. For this reason, Defendants argue that Plaintiff's only

remedy, i.e. a post-construction enforcement action, is premature.

The Court agrees with Defendants' analysis. While Plaintiff focuses largely on the text of the CAA, Plaintiff does not recognize the function of the 2002 NSR rules and Michigan's State Implementation Plan, which lessens the pre-construction burden on existing facilities so long as certain requirements are met. The 2002 NSR rules provide source operators such as Defendants with the option of either getting a permit before commencing their projects, or measuring their emissions afterward and running the risk of the Government bringing an enforcement action.

These rules, while still following the directives and intent of the CAA, provide source operators with greater flexibility by giving them a post-construction opportunity to fulfill their obligations under the CAA. They allow source operators to pursue necessary maintenance work without the expensive, burdensome and potentially unnecessary permitting requirements, while ensuring that Plaintiff will maintain its opportunity to pursue an enforcement action if post-construction monitoring detects an increase in emissions of regulated pollutants that are a result of such projects.

At the time of filing of this complaint, less than one year post-project, a determination of whether the projects at issue constitute a major modification is premature. "If [Defendant is] subsequently determined not to have . . . properly project[ed] emissions . . . [it] will be subject to any applicable enforcement provisions." 67 Fed. Reg. at 80,190. Plaintiff may pursue NSR enforcement if and when

post-construction monitoring shows a need to do so. Therefore, the Court finds that the instant action is premature, and that summary judgment for Defendants is appropriate.

Further, the Court rejects Plaintiff's argument that Defendants' Notice Letter was untimely. The Court notes that Defendants' notice was sent to the Michigan Department of Environmental Quality the day before construction on the project commenced. While the Court finds such timing to be minimally sufficient, Plaintiff cites no authority suggesting that notice must be given further in advance of the project's commencement date. As the Michigan rules have no requirement regarding how far in advance notice must be submitted, and Defendants were not required to obtain any determination from the Michigan Department of Environmental Quality before beginning construction, Defendants' notice was timely.

As to Plaintiff's argument that the language in Defendants' Notice letter contains boilerplate language from prior outage notifications at other power plants, the Court looks to Michigan's State Implementation Plan for direction. As detailed above, Michigan's State Implementation Plan requires a pre-construction Notice Letter to include (1) a description of the project; (2) identification of the emissions unit or units whose emissions of a regulated new major source review pollutant may be affected by the project; and (3) a description of the test used to determine that the project is not a major modification, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded, and an explanation

for why such amount was excluded, and any netting calculations, if applicable. *See* Mich. Admin. Code R. 336.2818(3).

Plaintiff argues that the text of the Notice Letter provides no analysis specific to the project and no explanation of why any emissions were excluded. Plaintiff contends that while under the rules Defendants may exclude a portion of the projected emissions increase from the calculation, Mich. Admin. Code R. 336.2801(ll), it must then provide the "reason for excluding that amount." *See* Mich. Admin. Code R. 336.2818(3)(a)(iii). Plaintiff argues that while Defendants projected a large emissions increase, they failed to provide any explanation of their basis for excluding emissions in their final calculation.

In response, Defendants assert that the Michigan Department of Environmental Quality, the appropriate reviewing authority for these sorts of projects, *see* Mich. Admin. Code R. 336.2818, did not question Defendants' notification, either upon submission or since that time. Accordingly, Defendants, argue they have not violated any requirement of the CAA, and this enforcement action should be dismissed. Further Defendants argue that their Notice Letter contained all of the required information, as it described the projects; identified the emissions unit that would be affected by the projects; provided their calculations of baseline and actual emissions, projected annual emissions and the amount of any increase in emissions over baseline levels that could be excluded as unrelated to the projects; and explained why Detroit Edison was excluding emissions based on market demand and

other factors unrelated to the project. Defendants' letter stated that "[a]s required under the new rules we then excluded from the . . . projections '. . . that portion of the unit's emissions following the project that an existing unit could have accommodated . . . and that are also unrelated to the particular project,' including increases due to demand and market conditions or fuel quality." D.E. 107 Exh. 2. In addition, Defendants' Notice Letter provided a table with all relevant calculations.

While the explanation of the emissions exclusion in the Notice Letter is not very specific, and the accompanying table shows the results of the calculations without their back-up data, Plaintiff does not point to any provision in Michigan's rules requiring specificity beyond that which was provided, and the Court has not found such provision on its own accord. Further, Plaintiff did not allege any insuffiency of the Notice Letter in its Notice of Violation. As the Court rules in its Order Granting Defendants' Motion for Protective Order, Plaintiff is barred from pursuing claims not specified in its Notice of Violation. D.E. 104.

VI. Order

Accordingly,

IT IS ORDERED that Defendants' motion for summary judgment is GRANTED.

Date: August 23, 2011

S/ Bernard A. Friedman__
BERNARD A. FRIEDMAN
UNITED STATES
DISTRICT JUDGE

APPENDIX H

CAA § 111, 42 U.S.C. § 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section

* * * * *

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

* * * * *

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

APPENDIX I

40 C.F.R. § 52.21 Prevention of significant deterioration of air quality.

(a)

* * * * *

(2) *Applicability procedures.*

* * * * *

(iv) The requirements of the program will be applied in accordance with the principles set out in paragraphs (a)(2)(iv)(*a*) through (*f*) of this section.

(*a*) Except as otherwise provided in paragraphs (a)(2)(v) and (vi) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

(*b*) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(iv)(*c*) through (*f*) of this section.

The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

(*c*) *Actual-to-projected-actual applicability test for projects that only involve existing emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in paragraph (b)(41) of this section) and the baseline actual emissions (as defined in paragraphs (b)(48)(i) and (ii) of this section), for each existing emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

* * * * *

(b) *Definitions*. For purposes of this section:

* * * * *

(41)(i) *Projected actual emissions* means the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated NSR pollutant in any one of the 5 years (12-month period) following the date the unit resumes regular operation after the project, or in any one of the 10 years following that date, if the project involves increasing the emissions unit's design capacity or its potential to emit that regulated NSR

pollutant and full utilization of the unit would result in a significant emissions increase or a significant net emissions increase at the major stationary source.

(ii) In determining the projected actual emissions under paragraph (b)(41)(i) of this section (before beginning actual construction), the owner or operator of the major stationary source:

(*a*) Shall consider all relevant information, including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the State or Federal regulatory authorities, and compliance plans under the approved State Implementation Plan; and

* * * * *

(*c*) Shall exclude, in calculating any increase in emissions that results from [t]he particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions under paragraph (b)(48) of this section and that are also unrelated to the particular project, including any increased utilization due to product demand growth; or

* * * * *

(r) *Source obligation.*

* * * * *

(6) Except as otherwise provided in paragraph (r)(6)(vi)(*b*) of this section, the provisions of this paragraph (r)(6) apply with respect to any regulated NSR pollutant emitted from projects at existing emissions units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility, within the meaning of paragraph (r)(6)(vi) of this section, that a project that is not a part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the method specified in paragraphs (b)(41)(ii)(*a*) through (*c*) of this section for calculating projected actual emissions.

(i) Before beginning actual construction of the project, the owner or operator shall document and maintain a record of the following information:

(*a*) A description of the project;

(*b*) Identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and

(*c*) A description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under paragraph (b)(41)(ii)(*c*) of this section and an explanation for why such amount was excluded, and any netting calculations, if applicable.

(ii) If the emissions unit is an existing electric utility steam generating unit, before beginning actual construction, the owner or operator shall provide a copy of the information set out in paragraph (r)(6)(i) of this section to the Administrator. Nothing in this paragraph (r)(6)(ii) shall be construed to require the owner or operator of such a unit to obtain any determination from the Administrator before beginning actual construction.

(iii) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions unit identified in paragraph (r)(6)(i)(*b*) of this section; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit that regulated NSR pollutant at such emissions unit.

(iv) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the Administrator within 60 days after the end of each year during which records must be generated under paragraph (r)(6)(iii) of this section setting out the unit's annual emissions during the calendar year that preceded submission of the report.

* * * * *

(vi) A "reasonable possibility" under paragraph (r)(6) of this section occurs when the

owner or operator calculates the project to result in either:

(*a*) A projected actual emissions increase of at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph (b)(40) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant; or

(*b*) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph (b)(41)(ii)(*c*) of this section, sums to at least 50 percent of the amount, that is a "significant emissions increase," as defined under paragraph (b)(40) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of paragraph (r)(6)(vi)(*b*) of this section, and not also within the meaning of paragraph (r)(6)(vi)(*a*) of this section, then provisions (r)(6)(ii) through (v) do not apply to the project.

To: Wehrum, Bill[Wehrum.Bill@epa.gov]; Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Woods, Clint[Woods.Clint@epa.gov]
From: Harlow, David
Sent: Tue 1/2/2018 11:26:23 PM
Subject: EPA's RMRR determination for Detroit Edison's proposed "Dense Pack" turbine blade project
Detroit Edison RMRR.pdf
12 12 2000 FR.pdf

As was briefly mentioned earlier this afternoon at our meeting, attached for your information **Ex. 5 - Deliberative Process**

Ex. 5 - Deliberative Process

EPA subsequently provided notice of this applicability determination in the *Federal Register*, a few weeks before the end of the Clinton Administration.

Ex. 5 - Deliberative Process

* * * *

In sum, in these actions and elsewhere, EPA has assessed routineness by considering the

following factors:

Nature

• Whether major components of a facility are being modified or replaced; specifically,

whether the units are of considerable size, function, or importance to the operation of the

facility, considering the type of industry involved

• Whether the change requires pre-approval of a state commission, in the case of utilities

• Whether the source itself has characterized the change as non-routine in any of its own

documents

• Whether the change could be performed during full functioning of the facility or while it

was in full working order

• Whether the materials, equipment and resources necessary to carry out the planned

activity are already on site

Extent

• Whether an entire emissions unit will be replaced

• Whether the change will take a significant time to perform

• Whether the collection of activities, taken as a whole, constitutes a non-routine effort,

notwithstanding that individual elements could be routine

• Whether the change requires the addition of parts to existing equipment

Purpose

• Whether the purpose of the effort is to extend the useful life of the unit; similarly, whether

the source proposes to replace a unit at the end of its useful life

• Whether the modification will keep the unit operating in its present condition, or whether

it will allow enhanced operation (e.g., will it permit increased capacity, operating rate,

utilization, or fuel adaptability)

Frequency

• Whether the change is performed frequently in a typical unit's life

Cost

• Whether the change will be costly, both in absolute terms and relative to the cost of

replacing the unit

• Whether a significant amount of the cost of the change is included in the source's capital

expenses, or whether the change can be paid for out of the operating budget (i.e., whether

the costs are reasonably reflective of the costs originally projected during the source's or

unit's design phase as necessary to maintain the day-to-day operation of the source)

These categories are interrelated. Many facts could be relevant to both nature and extent,

while others could overlap with purpose. Moreover, none of these factors -- standing alone --

conclusively determines a project to be routine or not. Instead, a permitting authority should take

account of how each of these factors might apply in a particular circumstance to arrive at a

conclusion considering the project as a whole.

* * * *

David S. Harlow
Senior Counsel

Immediate Office of the Assistant Administrator
Office of Air and Radiation, USEPA
WJC-N Room 5409K

1200 Pennsylvania Avenue NW
Washington, DC 20460
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may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Status of environmental analysis:* This application has been accepted, and is ready for environmental analysis at this time.

l. *Description of the Project:* The existing run-of-river project consists of: (1) 103-foot-long concrete gravity nonoverflow dam with the crest elevation of 773.0 feet; (2) 221-foot-long Taintor gate spillway; (3) 83-foot-long flashboard spillway with 12-inch-high flashboards; (4) nonoverflow concrete wall forming the left side of the powerhouse forebay; (5) headworks consisting of six head gates, a forebay, and the powerhouse intake; (6) powerhouse with a total installed capacity of 920 kilowatts, producing about 4.4 gigawatthours annually; (7) nonoverflow concrete gravity section extending from the headworks to the west retaining wall; (8) concrete retaining wall; (9) 198-acre reservoir with a total storage capacity of 1,980 acre-feet; (10) transmission lines; and (11) other appurtenances.

m. *Locations of the application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 208±1371. The application may be viewed on *http://www.ferc.fed.us/online/rims,* htm (call (202) 208±2222 for assistance). A copy is also available for inspection and reproduction at the address in item h above.

n. The Commission directs, pursuant to Section 4.34(b) of the Regulations (see Order No. 533 issued May 8, 1991, 56 FR 23108, May 20, 1991) that all comments, recommendations, terms and conditions, and prescriptions concerning the application be filed with the Commission within 60 days from the issuance date of this notice. All reply comments must be filed with the Commission within 105 days from the date of this notice.

Anyone may obtain an extension of time for these deadlines from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with 18 CFR 385.2008.

All filings must (1) bear in all capital letters the title ``COMMENTS'', ``REPLY COMMENTS'', ``RECOMMENDATIONS,'' ``TERMS AND CONDITIONS,'' or ``PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions, or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

David Boergers,

Secretary.

[FR Doc. 00±31574 Filed 12±11±00; 8:45 am]

BILLING CODE 6717±01±M

ENVIRONMENTAL PROTECTION AGENCY

[FRL±6915±4]

Prevention of Significant Deterioration of Air Quality (PSD) Applicability Determination.

AGENCY: Environmental Protection Agency.

ACTION: Notice of applicability determination.

SUMMARY: This notice announces that on May 23, 2000, the Environmental Protection Agency (EPA) Region 5, issued an applicability determination for Detroit Edison Company's Monroe Power Plant pursuant to the Prevention of Significant Deterioration of Air Quality (PSD) requirements under the Clean Air Act (Act) and regulations codified at 40 CFR 52.21.

DATES: Region 5 initially issued the above determination on May 23, 2000. The Administrator affirmed the determination on August 30, 2000.

FOR FURTHER INFORMATION CONTACT: Laura Hartman, Environmental Engineer, Permits and Grants Section, Air Programs Branch (AR±18J), Air and Radiation Division, United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353±5703, *hartman.laura@epa.gov.*

Anyone who wishes to review this determination and related materials can obtain this determination at *http://www.epa.gov/region5/air/permits/permits.htm or http://www.epa.gov/region07/programs/artd/air/nsr/nsrpg.htm.*

SUPPLEMENTARY INFORMATION: This supplementary information section is organized as follows:

A. What Action Is EPA Taking?

We are notifying the public that EPA has made a provisional determination regarding the applicability of the PSD regulations to the proposed replacement and reconfiguration of the high pressure section of two steam turbines at Detroit Edison's Monroe Power Plant, referred to as the Dense Pack project. Specifically, Detroit Edison Company requested EPA to determine: (1) Whether the Dense Pack project is a routine or non-routine change under the PSD regulations, and (2) if the project is not routine, whether it will require a PSD permit.

B. What Did EPA Determine?

Considering the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors, EPA found that the proposed Dense Pack project would not be routine maintenance, repair, and replacement. Consequently, EPA determined that the project would not be exempt from the PSD program on that basis.

However, the Dense Pack project must undergo PSD review only if the project would result in a significant net emissions increase of regulated pollutants. Under the applicable PSD regulatory provisions commonly known as the ``WEPCO rule'', *see* 57 FR 32314 (July 21, 1992), in determining if a physical change will result in a significant emissions increase at an electric utility plant, a company may use an ``actual'' to ``representative actual annual emissions'' test for emissions from the electric utility steam generating unit. Under this test, the company must calculate baseline emissions and project future emissions after the change. Because EPA has no information to dispute Detroit Edison's contention that actual emissions will not significantly increase at the modified units as a result of the Dense Pack project, and as long as the State permitting agency concurs with Detroit Edison's projection that emissions will not increase as a result of the project, Detroit Edison may proceed at any time with the project without first obtaining a PSD permit. EPA's determination is provisional because Detroit Edison has not provided a calculation of baseline emissions or projected future emissions to the State permitting agency for evaluation as is called for under the WEPCO rule. The company should do so before starting construction.

If, after the project is completed and the affected units resume regular operation, data reflecting actual emissions show a significant emissions increase resulting from the project, PSD would apply at that time.

C. How May Interested Parties Seek Judicial Review of this Action?

Interested parties with standing may seek judicial review of this decision under Section 307(b)(1) of the Act *only* by the filing of a petition for review in the United States Court of Appeals for the appropriate regional circuit within 60 days from the date on which this notice is published in the **Federal Register**. Under Section 307(b)(2) of the Act, this determination shall not be subject to later judicial review in civil or criminal proceedings for enforcement.

Dated: November 21, 2000.

Francis X. Lyons,

Regional Administrator, Region 5.

[FR Doc. 00±31617 Filed 12±11±00; 8:45 am]

BILLING CODE 6560±50±P

ENVIRONMENTAL PROTECTION AGENCY

[FRL±6915±3]

National Advisory Council for Environmental Policy and Technology, (NACEPT) Standing Committee on Compliance Assistance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of public advisory NACEPT standing committee on compliance assistance meeting; open meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92±463, notice is hereby given that the Standing Committee on compliance assistance will meet on the date and time described below. The meeting is open to the public. Seating at the meeting will be a first-come basis and limited time will be provided for public comment. For further information concerning this meeting, please contact the individual listed with the announcement below. NACEPT Standing Committee on Compliance Assistance; January 10th & 11th, 2001. Notice is hereby given that the Environmental Protection Agency will hold an open meeting of the NACEPT Standing Committee on Compliance Assistance on Wednesday, January 10, 2001 from 8:30 a.m. to 5 p.m., and January 11, 2001 from 8:30 a.m. to 4:45 p.m.. The meeting will be held at the Washington Monarch Hotel, 2401 M. St. NW, Washington, DC 20037. The agenda for both days of the meeting will be focused primarily on the workgroup discussion of strategic compliance assistance (CA) policy issues, including integrating CA into the Agency's mission, CA measurement and CA priority setting. A formal agenda will be available at the meeting.

SUPPLEMENTARY INFORMATION: NACEPT is a federal advisory committee under the Federal Advisory Committee Act, Public Law 92±463. NACEPT provides advice and recommendations to the Administrator and other EPA officials on a broad range of domestic and international environmental policy issues. NACEPT consists of a representative cross-section of EPA's partners and principal constituents who provide advice and recommendations on policy issues and serve as a sounding board for new strategies.

Over the last two years, EPA has undertaken a number of actions to improve out Compliance Assistance activities. To ensure that the Agency efforts to improve compliance assistance are implemented in a way that continues to reflect stakeholder needs, the National Advisory Council on Environmental Policy and Technology (NACEPT) created a new Standing Committee on Compliance Assistance. This will provide a continuing Federal Advisory Committee forum from which the Agency can continue to receive valuable stakeholder advice and recommendations on compliance assistance activities.

For further information concerning the NACEPT Standing Committee on Compliance Assistance, including the upcoming meeting, contact Joanne Berman, Designated Federal Officer (DFO), on (202) 564±7064, or E-mail: berman.joanne@epa.gov.

Inspection of Subcommittee Documents: Documents relating to the above topics will be publicly available at the meeting.

Dated: December 4, 2000.

Joanne Berman,

Designated Federal Officer.

[FR Doc. 00±31616 Filed 12±11±00; 8:45 am]

BILLING CODE 6560±50±U

ENVIRONMENTAL PROTECTION AGENCY

[OPP±34223B; FRL±6756±7]

Organophosphate Pesticide; Availability of Revised Risk Assessments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notices announces the availability of the revised risk assessments and related documents for the organophosphate pesticide malathion. In addition, this notice starts a 60-day public participation period during which the public is encouraged to submit risk management ideas or proposals. These actions are in response to a joint initiative between EPA and the Department of Agriculture (USDA) to increase transparency in the tolerance reassessment process for organophosphate pesticides.

DATES: Comments, identified by docket control number OPP±34223B, must be received by EPA on or before February 12, 2001.

ADDRESSES: Comments may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit III. of the **SUPPLEMENTARY INFORMATION**. To ensure proper receipt by EPA, it is imperative that you identify docket control number OPP±34223B in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: Anne Overstreet, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308-8068; e-mail address: overstreet.anne@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Does This Action Apply to Me?

This action is directed to the public in general, nevertheless, a wide range of stakeholders will be interested in obtaining the revised risk assessments and submitting risk management comments on malathion, including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the use of pesticides on food. As such, the Agency has not attempted to specifically describe all the entities potentially affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult

May 23, 2000

R-19J

Henry Nickel
Counsel for the Detroit Edison Company
Hunton & Williams
1900 K Street, N.W.
Washington D.C. 20006-1109

Dear Mr. Nickel:

I am responding to your request on behalf of the Detroit Edison Company for an applicability determination regarding the proposed replacement and reconfiguration of the high pressure section of two steam turbines at the company's Monroe Power Plant, referred to as the Dense Pack project. Specifically, you requested that the United States Environmental Protection Agency (EPA) determine whether the Dense Pack project at the Monroe Power Plant would be considered a major modification that would subject the project to pollution control requirements under the Prevention of Significant Deterioration (PSD) program.

We have reviewed your original request, dated June 8, 1999, and the supplemental information you submitted on December 10, 1999, and March 16, 2000. We provisionally conclude that the Dense Pack project would not be a major modification. Thus, Detroit Edison may proceed with the project without first obtaining a PSD permit. Although the Dense Pack project would constitute a nonroutine physical change to the facility that might well result in a significant increase in air pollution, Detroit Edison asserts that emissions will not in fact increase due to the construction activity, and EPA has no information to dispute that assertion.

As you know, nonroutine changes of any type, purpose, or magnitude at an electric utility steam generating unit -- ranging from projects to increase production efficiency to even the complete replacement of entire major components -- are excluded from PSD coverage as long as they do not significantly increase emissions from the source. Thus, Detroit Edison has been free to proceed at any time with the Dense Pack project without first obtaining a PSD permit as long as it adheres to its stated intention to not increase emissions as a result of the project. Indeed, EPA encourages the company to proceed with the project on this basis, since it appears to both reduce emissions per unit of output and not increase actual air pollution.

As you are also aware, under the applicable new source review regulations, in determining if a physical change will result in a significant emissions increase at an electric utility plant, companies may use an "actual" to "representative actual annual emissions" test for emissions from the electric utility steam generating unit, under which a calculation of baseline emissions and a projection of future emissions after the change is needed. Our determination of nonapplicability is provisional because Detroit Edison has not, to our knowledge, provided a calculation of baseline emissions or projected future emissions to the permitting agency, and this should be done prior to the start of construction. The basis for this determination is summarized below and is set forth in full in the enclosed detailed analysis.

In determining whether an activity triggers PSD, the Clean Air Act and EPA's regulations specify a two-step test. The first step is to determine if such activity is a physical or operational change, and if it is, the second step is to determine whether emissions will increase because of the change. The statute admits of no exception from its sweeping scope, but EPA's regulations contain some narrow exceptions to the definition of physical or operational change. In particular, Detroit Edison claims that the Dense Pack project is eligible for the exclusion for routine maintenance, repair, and replacement. The determination of whether a proposed physical change is "routine" is a case-specific determination which takes into consideration the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors. After carefully reviewing all the information you submitted in light of the relevant factors, EPA has determined that the proposed project is not "routine."

The purpose of the Dense Pack project, to significantly enhance the present efficiency of the high pressure section of the steam turbine, signifies that the project is not routine. An upgrade of this nature is markedly different from the frequent, inexpensive, necessary, and incremental maintenance and replacement of deteriorated blades that is commonly practiced in the utility industry. For instance, past blade maintenance and replacement of only the deteriorated blades at Detroit Edison has never increased efficiency over the original design. Accordingly, because increasing turbine efficiency by a total redesign of a major component is a defining feature of the proposed Dense Pack project, it clearly goes significantly beyond both historic turbine work at Detroit Edison, and what would otherwise be considered a regular, customary, or standard undertaking for the purpose of maintaining the existing steam turbine units. The project also goes well beyond routine turbine

maintenance, repair, and replacement activities for the utility industry in general.

The nature and extent of the work in question -- replacement of the entire high pressure sections of the steam turbines for Units 1 and 4 at Monroe -- suggests that the Dense Pack project is not routine. It would result in greater efficiency above the level that can be reached by simply replacing deteriorated blades with ones of the same design and, in addition, will substantially increase efficiency over the original design. Specifically, the Dense Pack upgrade would not only restore the 7 percent of the efficiency rating lost over the years at each unit but would improve the unit's efficiency by an additional 5 percent over its original design capacity. Accordingly, the proposed project represents a significant and major redesign and replacement of the entire high pressure sections of the steam turbines at Units 1 and 4 at the Monroe facility.

The frequency with which utilities have undertaken turbine upgrades like the Dense Pack project also indicates the nonroutine nature of the changes. The information provided by Detroit Edison, regarding past history at the Monroe facility, describes what is characterized as necessary maintenance, repair, and replacement of deteriorated turbine blades approximately every 4 years. During these overhaul periods, it is not uncommon for the company to replace up to several turbine blades at one time. It is common among other utilities to also perform similar turbine maintenance. However, Detroit Edison has not provided any information to suggest that a complete replacement and redesign of the high pressure section of a steam turbine is conducted frequently at Monroe or at any other individual utility. Instead, Detroit Edison relies on its claim that projects "similar" to the Dense Pack project have been performed at a number of utilities. This information does not indicate that the replacement of the high pressure section of the steam turbine is frequent at the typical utility source; to the contrary, the only available information reflects that projects like the Dense Pack project have been performed only one time, if ever, at individual sources.

The cost of the Dense Pack project is significant and tends to indicate that this project is nonroutine. Detroit Edison expects the Dense Pack replacement to cost approximately $6 million for each turbine unit, for a total of $12 million. The EPA has rejected claims of routineness in past cases where the cost was substantially less than this figure. Moreover, Detroit Edison intends to capitalize the entire cost of this project, and EPA believes that a $12 million project that is 100 percent capital improvement indicates that it is a major undertaking.

Beyond the clearly significant absolute cost of this project, available information suggests that this expenditure far exceeds the cost typically associated with turbine blade maintenance activity. Detroit Edison provided only a summary of the total project costs for past maintenance and inspections at the facility, the total costs of which ranged from less than $1 million to a little more than $6 million. Although Detroit Edison did not provide any detail regarding what specific activities comprise these aggregated amounts, it acknowledges that it spent only $18,700, $33,100, and $7,900 to replace high-pressure rotors in three turbine projects in 1981 and 1982. Further, the project is significantly more costly than simply replacing deteriorated blades today; Detroit Edison acknowledges that the Dense Pack upgrade would cost three times more than its alternative blade repair and replacement project. Accordingly, it appears that the costs associated with the Dense Pack project greatly exceed the amounts spent previously by Detroit Edison or that it would spend presently for the replacement of deteriorated turbine blades or rotors.

For the reasons delineated above, we conclude that the changes proposed by Detroit Edison are not routine. Detroit Edison's submissions do not demonstrate that projects such as the Dense Pack project are frequent, inexpensive, or done for the purpose of maintaining the facility in its present condition. Instead, the source relies on two principal arguments: (1) it claims that this project is less significant in scope than was the activity in question in the 1988 applicability determination for the Wisconsin Electric Power Company (WEPCO); and (2) it alleges that EPA has interpreted the exclusion for routine activity expansively to exempt all projects that do not increase a unit's emission rate. EPA rejects both of these arguments, the former because both EPA and the U.S. Court of Appeals for the Seventh Circuit viewed WEPCO's activity as "far from" routine and thus this attempted comparison to WEPCO is unsuitable, and the latter because it is demonstrably incorrect. The attached analysis addresses these points in significant detail.

When nonroutine physical or operational changes significantly increase emissions to the atmosphere, they are properly characterized as major modifications and are subject to the PSD program. In general, a physical change in the nature of the Dense Pack project, which provides for the more economical production of electricity, would be expected to result in the increased utilization of the affected units, and thus, increased emissions. Notwithstanding the fact the Monroe units may be high on the dispatch order, the Dense Pack project would allow Detroit Edison to produce electricity more cheaply per unit of output, thereby creating an incentive to run Units 1 and 4 above current

levels. Even a small increase over current normal levels in the utilization of the affected units would result in a significant increase in actual emissions of criteria pollutants. For example, in 1997, at the Monroe facility Unit 1 emitted approximately 14,000 tons of nitrogen oxides (NO_x) and 41,000 tons of sulfur dioxide (SO_2), and Unit 2 emitted 12,000 tons of NO_x and 35,000 tons of SO_2. Based on this information, if a one to five percent increase in operation were to result from the Dense Pack project, increases on the order of 160-800 tons of NO_x and 400-2000 tons of SO_2 would occur.

Detroit Edison, however, maintains that emissions will not increase as a result of the Dense Pack project. Specifically, the company contends that representative actual annual emissions following the change will not be greater than its pre-change actual emissions, because the Dense Pack upgrade will not result in increased utilization of the units. As you are aware, the PSD regulations (under the provisions commonly known as the "WEPCO rule") allow a source undertaking a nonroutine change that could affect emissions at an electric utility steam generating unit to lawfully avoid the major source permitting process by using the unit's representative actual annual emissions to calculate emissions following the change if the source submits information for 5 years following the change to confirm its pre-change projection. In projecting post-change emissions, Detroit Edison does not have to include that portion of the unit's emissions which could have been accommodated before the change and is unrelated to the change, such as demand growth.

Under the WEPCO rule, Detroit Edison must compute baseline actual emissions and must project the future actual emissions from the modified unit for the 2-year period after the physical change (or another 2-year period that is more representative of normal operation in the unit's modified state). As noted above, Detroit Edison has not provided these figures to verify its projection of no increase in actual emissions, and should submit them to the Michigan Department of Environmental Quality prior to beginning construction. In addition, Detroit Edison must maintain and submit to the permitting agency on an annual basis for a period of at least 5 years (or a longer period not to exceed 10 years, if such a period is more representative of the modified unit's normal post-change operations) from the date the units at the Monroe Plant resume regular operation, information demonstrating that the renovation did not result in a significant emissions increase. If Detroit Edison fails to comply with the reporting requirements of the WEPCO rule or if the submitted information indicates that emissions have increased as a consequence of the change, it will be required to obtain a PSD permit for the Dense Pack project.

Finally, regardless of whether PSD review is triggered due to the Dense Pack project, Detroit Edison must meet all other applicable federal, state, and local air pollution requirements.

This determination will be final in 30 days unless, during that time, Detroit Edison seeks to confer with or appeal to the Administrator or her designee regarding it. If you have any questions regarding this determination, please contact Laura Hartman, Environmental Engineer, at (312) 353-5703, or Jane Woolums, Associate Regional Counsel, at (312) 886-6720.

Sincerely,

/s/

Francis X. Lyons
Regional Administrator

Enclosure

cc: Peter Marquardt, Esq., Special Counsel
Detroit Edison Company
2000 Second Avenue - 688 WCB
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Russell Harding, Director
Michigan Department of Environmental Quality

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ENCLOSURE
DETROIT EDISON APPLICABILITY DETERMINATION
DETAILED ANALYSIS

I. Introduction

If a company intends to construct a major source or a major modification at a source, that source is required to obtain a major new source review permit before beginning construction. If a source questions whether a change is subject to major new source review, the source can request an applicability determination. In this case, Detroit Edison Company has requested an applicability determination from the United States Environmental Protection Agency (EPA). This analysis outlines EPA's decision on the applicability determination for Detroit Edison's proposed project.

II. Summary of Request and Brief Conclusion

Detroit Edison Company is proposing to replace and reconfigure the high pressure portion of two steam turbines at its Monroe Power Plant. The company refers to this project as the "Dense Pack" project. In general, the Dense Pack project would consist of replacing and reconfiguring all of the blades in the high-pressure section of two turbines to substantially increase plant efficiency and reduce maintenance costs. On June 8, 1999, Henry Nickel, Hunton & Williams, submitted on behalf of Detroit Edison a request that EPA determine whether the Dense Pack project would be a "major modification" to the Monroe source, subject to the Prevention of Significant Deterioration (PSD) requirements of the New Source Review (NSR) program. An activity is a major modification and requires a PSD permit if it constitutes a nonexempt physical or operational change and if it results in a significant net increase in emissions. Detroit Edison claimed that the proposed Dense Pack project at two units in Detroit Edison's Monroe Power Plant would not be a "physical change," as the PSD regulations use that term, but instead would qualify for an exemption from the definition of "physical change" under the exclusion for routine maintenance, repair, and replacement. In the alternative, Detroit Edison maintained that the change would not result in an emissions increase that would trigger PSD.

In a letter dated June 25, 1999, EPA wrote Mr. Nickel acknowledging receipt of the request. In another letter to Mr. Nickel dated July 12, 1999, EPA requested more information regarding the proposed Dense Pack project and Detroit Edison's arguments in order to proceed with the review. On December 10, 1999, Mr. Nickel submitted information in response to EPA's July 12th request. In addition, on March 16, 2000, Detroit Edison submitted another letter, along with additional supporting materials. The following summarizes EPA's review of the proposed Dense Pack project based upon these submissions.

EPA has provisionally determined that PSD would not apply at this time if Detroit Edison were to construct the Dense Pack upgrade as described. The project would entail substantial, infrequently performed, and costly construction for the purpose of increasing the source's generating capacity both beyond its prior design and its current capacity. Accordingly, EPA finds that the upgrade is a "physical change," as that term is used in the Clean Air Act (CAA) and its implementing regulations. The Agency rejects Detroit Edison's claim that the project qualifies for the exemption for routine maintenance, repair, and replacement, because our analysis of the

nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors, leads us to conclude that the project is not "routine" as EPA has historically interpreted that regulatory term. In addition, because the Dense Pack project will substantially increase the operational and economic efficiency of the Monroe facility, EPA finds that the project provides an incentive to significantly increase utilization, and thus, emissions. Detroit Edison has stated, however, that emissions at the plant will not in fact increase as a result of the Dense Pack upgrade, and EPA has no specific information to dispute that assertion. Accordingly, EPA provisionally accepts Detroit Edison's assertion of no emissions increase. However, to establish that no emissions increase will result and that PSD does not apply, the regulations applicable to electric utility steam generating units call for a calculation of baseline actual emissions and a projection of future actual emissions. Thus, before beginning construction on the project, Detroit Edison should provide this calculation and projection to the permitting agency to affirm its assertion of no emissions increase.

III. Factual Background

A. Current Conditions

Detroit Edison's Monroe Power Plant contains four coal-fired boilers, along with four associated steam turbines. The turbines convert the steam generated in the boilers into electric energy, using a system of blades or buckets to convert the energy stored in the steam from the boilers into mechanical energy. This mechanical energy is then transferred to an electric generator. The Dense Pack project is being proposed for two of the four turbines, Units 1 and 4. Units 1 and 4 began operating in 1971 and 1974, respectively. Both units have nominal ratings of 750 megawatts. Currently, the units at Detroit Edison's Monroe Plant, along with those at its Belle River Power Plant, are very high in the loading order for fossil fuel generation in the Detroit Edison system. Detroit Edison claims that, as a result, it has operated Units 1 and 4 at or near maximum capacity over the past five years. Specifically, between 1995 and 1998, the capacity factors for Unit 1 and Unit 4 have been 82.8%, 62.7%, 87.8%, 83.5%, and 63.0%, 82.2%, 79.6%, 87.4%, respectively.

According to submitted information, Detroit Edison shuts down the electric generating units and performs inspections approximately every four years. In addition to other work on other portions of the facility, Detroit Edison performs necessary maintenance, repair, and replacement of individual deteriorated turbine blades at that time. Historically, the source has not had to repair or replace blades in the high pressure section of the turbines every time it inspected them, but such maintenance, including piecemeal repair or replacement, occurs periodically. Detroit Edison states that these scheduled outages typically last a minimum of six weeks, but does not specify how much of this time is devoted to the repair and replacement of worn blades. In general, repair or replacement of the turbine blades could be to maintain fuel efficiency, reliability, safety, or generating capacity, or to comply with regulatory requirements, insurance company requirements, corporate practices, or other reasons. It appears from individual inspection reports that maintaining efficiency was the stated reason for most inspections and maintenance.

According to Detroit Edison, the turbines at Units 1 and 4 currently are operating at 7% below their original efficiency ratings due to accumulated deterioration in the high-pressure turbine blades. Replacement of the deteriorated blades with blades of the same design would replace only 2% of the lost efficiency, leaving the units 5% below their original efficiency rating. Detroit Edison estimates the cost of replacing only the currently deteriorated blades to be approximately $2 million per unit. Detroit Edison provided only a summary of the project costs for past maintenance and inspections at the facility, the total costs of which ranged from less than $1 million to a little more than $6 million. Detroit Edison spent $18,700, $33,100, and $7,900 to replace high-pressure rotors in three projects in 1981 and 1982. Detroit Edison has not provided other specific cost information regarding the cost of on-site blade repair and replacement or similar information for the utility industry as a whole.

B. Proposed Dense Pack Project

Detroit Edison is proposing to replace the entire high-pressure sections of two turbines to allow for the use of a new type of turbine blade and to reconfigure the design in order to improve efficiency and reduce maintenance costs. To install the Dense Pack, Detroit Edison must shut down the units. Detroit Edison expects the installation to take approximately 44 days, and plans to complete the installation during the time normally allotted for turbine outages. Installation of the Dense Pack would involve replacement and reconfiguration of blades in the high-pressure sections of the two units, using rotors and casings to support the new blade configuration. In addition, the Dense Pack would use a newer, substantially improved type of blade than is currently in use at the Monroe facility.

As noted above, Detroit Edison states that the high pressure sections of the turbines at Units 1 and 4 are operating at 7% below their original efficiency ratings due to accumulated deterioration in the high-pressure section of the turbines. The Dense Pack project would increase efficiency of the high-pressure sections of the turbines over current levels by 12%, restoring the 7% lost efficiency at the high pressure section and improving the efficiency of the high-pressure section by 5% over the original design. This increased efficiency in the high-pressure sections would increase the overall efficiency of each of the turbines by 4.5%. In addition, the new Dense Pack configuration could reduce efficiency deterioration by 70%. Therefore, Detroit Edison expects the inspections and needed repair or replacements to occur once every 10 years, instead of once every 4 years.

Detroit Edison expects the Dense Pack project to cost approximately $12 million. Detroit Edison plans to capitalize 100% of the cost of the Dense Pack project.

IV. Physical Change/Change in the Method of Operation

Before providing its analysis of whether the Dense Pack project would constitute a physical or operational change, EPA believes it would be useful to review what the statute and regulations require and how they have been applied historically. Thus, the following discussion provides a context for the analysis of the project that follows.

A. Statutory and Regulatory Requirements

1. Overview

Both the CAA and the NSR regulations require a physical or operational change to occur before any particular activity is considered a "modification" which triggers new source requirements. The applicable provisions do not, however, define what constitutes a physical or operational change. EPA historically has acknowledged -- in view of these undefined broad statutory and regulatory terms -- that they could "encompass the most mundane activities at an industrial facility (even the repair or replacement of a single leaky pipe, or a change in the way that pipe is utilized)." 57 Fed. Reg. 32314, 32316 (July 21, 1992). Recognizing that Congress did not intend everything undertaken at a stationary source to be subject to new source requirements, id., EPA has long exempted certain narrow classes of activities from being considered physical or operational changes. Accord Alabama Power Co. v. Costle, 636 F.2d 323, 400 (D.C. Cir. 1980) (although "the term 'modification' is nowhere limited to physical changes exceeding a certain magnitude," EPA possesses the authority to provide exemptions from the definition where they are of de minimis benefit or where administratively necessary). There are several such exclusions, but only one is at issue in the present case[1] – the exclusion for "routine"

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1. Detroit Edison suggests that the Dense Pack replacement project is also exempt from PSD as a pollution control project, see, e.g., 40 C.F.R. § 52.21(b)(2)(iii)(*h*), because the source anticipates that the project will decrease the units' emissions on a per-unit-of-output basis. December 10 Letter at 2; March 16 Letter at 3. This claim is not substantiated in any of Detroit Edison's correspondence with the Agency. Our analysis above accordingly focuses on Detroit Edison's primary claim -- that its activity is routine. At the same time, however, EPA does not want to give the impression that it tacitly agrees with Detroit Edison's claimed exemption; to the contrary, the Dense Pack replacement project does not meet the definition of "pollution control project" in the regulations. See 40 C.F.R. §52.21(b)(2)(iii)(*h*), (b)(32). Moreover, virtually any major capital improvement project at an existing source is designed in part to increase efficiency of production, and this will in turn almost always have the collateral effect of reducing emissions per unit of production, even though it may provide an economic incentive to increase total production, with the net result that actual emissions of air pollution to the atmosphere could increase significantly. There is nothing in the statutory terms or structure or in EPA's regulations which suggests that such major changes should be accorded exempt status under the NSR program. To the contrary, major capital investments in industrial equipment, where they could

(continued...)

activity.

2. Scope of Exclusion for Routine Activity

a. Statutory and Regulatory Text

The starting point for analysis of any exemption is the language of the statute and governing regulations. Section 111(a)(4) of the CAA reads as follows:

> The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

CAA § 111(a)(4). The CAA requires a PSD permit prior to "construction" of a major stationary source of any pollutant for which the area in which the source is located is designated attainment or unclassifiable, id. § 165(a), and it defines "construction" as including modifications (as defined in section 111) to existing facilities. Id. § 169(2)(C). EPA's regulations generally track the statute:

> (2)(i) *Major modification* means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase. . . .

E.G., 40 C.F.R. §52.21(b)(2).[2] The plain language of these statutory and regulatory requirements

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1. (...continued)
result in an increase in emissions, appear to be precisely the type of change at an existing source that Congress intended should be subject to PSD and nonattainment area NSR permitting. See Prevention of Significant Deterioration and Nonattainment New Source Review; Proposed Rule, 61 Fed. Reg. 38250, 38262 (July 23, 1996) ("NSR Reform" proposed rulemaking). See also Puerto Rican Cement Co. v. EPA, 889 F.2d 292, 297-98 (1st Cir. 1989) (modification of emissions unit that decreases emissions per unit of output, but may result in sufficient production increase such that actual emissions will increase, is subject to PSD). Conversely, nonroutine and otherwise nonexcluded changes of any type, regardless of whether they are projects such as the Dense Pack intended to increase production efficiency, or even the complete replacement of an entire industrial plant, are excluded from PSD coverage so long as they do not result in significant emissions increases. See infra note 4.

2. In this determination, EPA refers interchangeably to the "PSD" and "NSR" programs. There are multiple sets of PSD and NSR regulations, governing the general (or "minor") program
(continued...)

indicates their sweeping scope. Both the CAA and its implementing regulations define "modification" as including any physical or operational change. See 42 U.S.C. § 7411(a)(4), CAA § 111(a)(4); see also, e.g., 40 C.F.R. § 52.21(b)(2)(i). In light of that breadth, any regulatory exemption from the statutory and regulatory requirements should be interpreted in a limited way. See Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901, 908-09 (7th Cir. 1990) ("WEPCO") ("courts considering the modification provisions of NSPS and PSD have assumed that 'any physical change' means precisely that").[3]

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2. (...continued)
and the programs for major sources in attainment and nonattainment areas, and governing those programs where EPA is the permitting authority and those where the state is the permitting authority. For ease of use, this document refers to only the applicable requirements here, 40 C.F.R. § 52.21. Those requirements apply where, as here, the state does not have an approved PSD program in its state implementation plan and the federal PSD program regulations apply instead. See id. § 52.1180. EPA has delegated implementation of the PSD program to Michigan, which issues federal PSD permits on EPA's behalf. See id. § 52.21(u). It bears noting, however, that EPA regulations governing approved PSD programs and NSR programs for nonattainment areas also contain an identically worded exclusion for routine activity. In addition, the regulations governing EPA's new source performance standards (NSPS) contain a similar exemption for routine activity. Accordingly, the discussion below does not differentiate between the two programs, and relies upon relevant NSPS precedents as instructive in the NSR program. See 57 Fed. Reg. at 32316 (noting that physical/operational change step "is largely the same for NSPS and NSR"). The most significant difference between the programs' definition of "physical change" is that the NSR regulations do not require a source to affirmatively seek an applicability determination to be exempt as a routine change, id. at 32332, but the NSPS regulations plainly do. 40 C.F.R. § 60.14(e)(1) (activity is exempt if it is "[m]aintenance, repair, and replacement which the Administrator determines to be routine for a source category"). In all respects relevant to this determination, however, the regulations are identical.

3. There is a rule of law that exclusions from generally applicable regulations should be construed narrowly. See Auer v. Robbins, 519 U.S. 452, 462-63 (1986) (recognizing general rule of construction for regulations); see also O'Neal v. Barrow County, 980 F.2d 674, 677 (11th Cir. 1993) (where statute does not provide for exemption, regulations providing for one should be narrowly construed). Similarly, regulatory provisions should be read in conjunction with the statutes from which they are derived and with other similar provisions. Thus, just as other exclusions from the new source provisions are limited to narrow circumstances, one should read the exclusion for routine activity similarly. See, e.g., 40 C.F.R. §§ 52.21(b)(2)(iii)(*b*)-(*e*) (governing the use of alternative fuels when the source is ordered to do so pursuant to certain federal laws, when the fuel is derived from municipal solid waste, when allowed by existing permit, or when the source was capable of accommodating it before January 6, 1975 and is not prohibited from using it by a subsequent federally enforceable permit term); 52.21(b)(2)(iii)(*g*) (excluding changes in ownership of the stationary source).

The requirement that a source both make a physical or operational change and increase emissions to be considered a modification further suggests that the physical or operational change prong of the test should be broadly construed. The statute grandfathers existing facilities from the expense of state-of-the-art controls, but not permanently. Rather, the CAA effected a balance of concerns; if plants were modified – i.e., physically or operationally changed in a manner that increased emissions – the grandfather status would be lost, and NSR would apply. The requirement that there be a net increase in emissions at a source before a modification is deemed to have occurred, however, makes the grandfather provision potentially quite broad.[4] Indeed, this limitation on the modification rule has been viewed by EPA as open-ended – the grandfather status can be permanent so long as emissions do not increase – and environmental groups have long complained of this NSR "loophole."[5]

It is against that statutory and regulatory backdrop that EPA adopted the exclusion for routine activity. It provides:

> (iii) A physical change or change in the method of operation shall not include:
> *(a)* Routine maintenance, repair, and replacement. . . .

40 C.F.R. § 52.21(b)(2). The text of the routineness exclusion itself conveys the narrowly limited scope of the exemption. Because the regulations provide no definition of "routine," nor does the preamble of the notice promulgating the exclusion contain a discussion that would give the exemption a particular meaning for the NSR program, the regulatory term should be used in its ordinary sense. Webster's defines "routine" as "of a commonplace or repetitious character"; "of, relating to, or being in accordance with established procedure." These definitions suggest that determining routineness appropriately involves considering whether the activity is frequent (is it "repetitious"), whether it is of significant scope (is it "commonplace"), and whether it is for a customary purpose or is being accomplished in a customary fashion (is it "in accordance with established procedure").

b. Applicability Determinations and Other EPA Actions Construing Routineness

In formal NSR applicability determinations, EPA has consistently interpreted the exclusion for "routine" activities narrowly. The Agency's most comprehensive discussion of the exclusion came as part of an applicability determination for WEPCO's Port Washington utility life extension

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4. See, e.g., Alabama Power Co. v. Costle, 636 F.2d 323, 401 (D.C. Cir. 1979) (requiring EPA to allow replacement of depreciated capital goods without a PSD permit where no increase in emissions at the source would result, due to offsetting decreases, because "Congress wished to apply the permit process . . . only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase)."

5. See, e.g., Comments of NRDC on NSR Reform proposed rulemaking (63 Fed. Reg. 39857, Notice of Availability, July 24, 1998), EPA Docket No. A-90-37, Oct. 8, 1998.

project, which was upheld by the United States Court of Appeals for the Seventh Circuit. As in the present case, EPA's analysis began with the breadth of the modification provision, turning next to "the very narrow exclusion provided in the regulations," that is, the exclusion for "routine" activity. See Memorandum from Don R. Clay, Acting Assistant Administrator for Air and Radiation, to David A. Kee, Air and Radiation Division, Region V, at 3 (Sept. 9, 1988) (Clay Memo). EPA then described the core test for meeting this exclusion: "In determining whether proposed work at an existing facility is 'routine,' EPA makes a case-by-case determination by weighing the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors, to arrive at a common-sense finding." Id. Applying these commonsense factors, the Agency concluded that the WEPCO project was "far from being a regular, customary, or standard undertaking for the purpose of maintaining the plant in its present condition." Id. [6]

The WEPCO determination and subsequent court case led to significant national attention, Congressional hearings, and statutory and regulatory changes, but neither the provisions regarding routine activity nor EPA's interpretation of those provisions were affected.

Beyond the WEPCO decisions, EPA has given further guidance in other NSR and NSPS applicability determinations and related actions which elaborate on the preceding factors.[7] For example, in a 1987 applicability determination regarding the reactivation of a roaster/leach/acid plant at the Cyprus Casa Grande Corporation's copper mining and processing facilities, EPA determined that the proposed project would constitute a "major modification," and did not fall into the "narrow and limited set of exclusions" from PSD, including the exclusion for routine activity. See Letter from David P. Howekamp, Director, Air Quality Management Division, Region IX, to Robert T. Connery, Esq., at 3-4 (Nov. 6, 1987). In particular, EPA concluded that because the project called for the replacement of integral components and would entail significant

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6. Specifically, WEPCO proposed to modify its facility in a way that would replace numerous major components of the facility (including the steam drums), would require pre-approval from the state utility commission, would significantly enhance the efficiency and current production capacity of the plant and extend its useful life, would rarely be repeated during a unit's life, and would cost a substantial amount of money, over half of which was designated as capital costs. Id. at 4-6. On review, the Seventh Circuit upheld this portion of EPA's determination in its entirety. See WEPCO, 893 F.2d at 910-13.

7. In addition to the guidance discussed above, EPA's narrow interpretation of the exclusion for routine activity is evident from a passage in its brief to the Seventh Circuit in WEPCO. That brief generally reiterates the points addressed in the applicability determination that was the subject of the litigation, but elaborates with a helpful example. EPA analogized industrial facilities to automobiles, emphasizing that the "regulatory exception for routine, maintenance, repair and replacement was meant to cover such things as an oil change, replacing a broken headlamp or worn-out tires, changing the sparkplugs, or other similar activities," rather than permitting the replacement of such items as the engine or transmission. Respondent's Brief at 51, WEPCO v. Reilly, 893 F.2d 901 (7th Cir. 1990) (Nos. 88-3264 & 89-1339).

time (4 months) and cost (an absolute cost of $905,000, which constituted 10 percent of the cost of replacing the repaired unit), it was not routine. Id. at 5-6. The agency also noted that certain activities, although they would be routine "if performed regularly as part of standard maintenance procedure while the plant was functioning or in full working order," were being performed as part of an extensive rehabilitation project and, thus, were properly considered non-routine. Id. at 6; see also In re: Monroe Electric Generating Plant, Petition No. 6-99-2 at 11, 19 & n. 19 (Adm'r 1999) (in grant of CAA § 505(b)(2) veto petition, stating principle that a non-routine collection of activities, considered 'as a whole,' is not exempt under routine exclusion, even if individual activities could be characterized as routine). In another case, in 1975, EPA Region X determined that the upgrade of boilers at a pulp mill was non-routine under NSPS, in that it called for the addition of additional pressure parts previously not included in the boilers to increase the superheater surface of the boilers, even though the additional parts were contemplated under the original boiler design. Request for Ruling Regarding Modification of Weyerhaeuser's Springfield Operations, Reg. Counsel, Reg. X (Aug. 18, 1975). When reviewing whether a project was routine, other applicability determinations have considered whether the project involved: (1) the addition of certain parts previously not included in the units; (2) the expansion of parts of a unit; or (3) the replacement of an entire emissions unit. For copies of these actions and other applicability determinations and guidance documents, please see EPA's publicly-available databases, available at: http://www.epa.gov/ttn; http://www.epa.gov/region07/programs/artd/air/nsr/nsrpg.htm; and http://www.epa.gov/oeca/eptdd/adi.html, or contact the staff members named in the cover letter.

In sum, in these actions and elsewhere, EPA has assessed routineness by considering the following factors:

Nature

- Whether major components of a facility are being modified or replaced; specifically, whether the units are of considerable size, function, or importance to the operation of the facility, considering the type of industry involved
- Whether the change requires pre-approval of a state commission, in the case of utilities
- Whether the source itself has characterized the change as non-routine in any of its own documents
- Whether the change could be performed during full functioning of the facility or while it was in full working order
- Whether the materials, equipment and resources necessary to carry out the planned activity are already on site

Extent

- Whether an entire emissions unit will be replaced
- Whether the change will take a significant time to perform
- Whether the collection of activities, taken as a whole, constitutes a non-routine effort, notwithstanding that individual elements could be routine
- Whether the change requires the addition of parts to existing equipment

Purpose

- Whether the purpose of the effort is to extend the useful life of the unit; similarly, whether the source proposes to replace a unit at the end of its useful life
- Whether the modification will keep the unit operating in its present condition, or whether it will allow enhanced operation (e.g., will it permit increased capacity, operating rate, utilization, or fuel adaptability)

Frequency

- Whether the change is performed frequently in a typical unit's life

Cost

- Whether the change will be costly, both in absolute terms and relative to the cost of replacing the unit
- Whether a significant amount of the cost of the change is included in the source's capital expenses, or whether the change can be paid for out of the operating budget (i.e., whether the costs are reasonably reflective of the costs originally projected during the source's or unit's design phase as necessary to maintain the day-to-day operation of the source)

These categories are interrelated. Many facts could be relevant to both nature and extent, while others could overlap with purpose. Moreover, none of these factors -- standing alone -- conclusively determines a project to be routine or not. Instead, a permitting authority should take account of how each of these factors might apply in a particular circumstance to arrive at a conclusion considering the project as a whole.

3. Analysis of Detroit Edison's Objections to EPA's Longstanding, Narrow Interpretation of the Exclusion for Routine Activity

In support of its request, Detroit Edison has submitted a number of documents in which members of the electric utility industry claim that EPA has recently changed its interpretation of the routineness exclusion by narrowing it and that EPA's prior interpretation was expansive. See, e.g., Supplemental Comments of the Utility Air Regulatory Group, EPA Air Docket No. A-90-37 (Oct. 8, 1999) (UARG Comments).[8] As discussed below these arguments lack merit. Moreover, it bears noting that if companies have specific questions about the scope of the exclusion, EPA has long encouraged sources to seek guidance from their permitting authorities, see New Source Review Workshop Manual at A.33-34 (Draft Oct. 1990).

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8. The UARG comments submitted by Detroit Edison in support of its applicability determination request pertain to the ongoing "NSR Reform" rulemaking. See 61 Fed. Reg. 38250 (1996). The views expressed here regarding the UARG Comments pertain only to this applicability determination and are without prejudice to the ultimate outcome of the pending rulemaking.

a. Claim that Construction that Does Not Increase Unit's Emission Rate Is Routine

Among Detroit Edison's contentions is the assertion that the routine activity exclusion is properly read (and historically has been read by EPA) to cover all "capital projects to replace degraded components without increasing the design capacity or maximum achievable hourly emission rates." See UARG Comments at 43. This interpretation would leave NSR to cover only "those activities that would create 'new air pollution' by significantly increasing the pollutant emitting capabilities of the source as designed and built." Id. at 13. In essence, this argument holds that extensive construction activity at a source is exempt from new source requirements, even if actual emissions to the atmosphere increase, where the source's potential to emit does not increase. This contention does not withstand scrutiny. EPA's regulations have since 1980 explicitly required keying NSR applicability for modifications to the actual emissions consequences of a particular change. See, e.g., 40 C.F.R. §§ 52.21(b)(2)(i) (defining "major modification" as a change resulting in a significant "net emissions increase"); 52.21(b)(3)(i) (defining "net emissions increase" based on "actual emissions"); see also 45 Fed. Reg. 52676, 52700 (Aug. 7, 1980) (explaining EPA's adoption of actual emissions baseline for modifications). Industry has understood this facet of the NSR program from the outset; indeed, it was one of the central points on which industry sought review of the 1980 regulations. See Brief for Industry Petitioners on Actual Emissions Definition of Net Increase, Chemical Mfrs. Ass'n v. EPA (D.C. Cir.) (No. 79-1112). Accepting Detroit Edison's proffered interpretation of the routine activity exemption, however, would moot this longstanding and contentious quarrel and would make meaningless the provisions in the regulations governing the actual emissions baseline for modifications. This runs counter to the general presumption that interpretations that render part of a regulation superfluous are to be avoided. See, e.g., U.S. v. Larson, 110 F.3d 620, 626 (8th Cir. 1997); accord WEPCO, 893 F.2d at 909 (rejecting WEPCO's proffered definition of "physical change," because it "would open vistas of indefinite immunity from the provisions of NSPS and PSD").[9]

b. Mary Nichols Representation that "Restoration" Activity Can Be Routine

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9. The argument that only changes that increase a unit's emissions rate can trigger the NSR modification provisions has been rejected by two courts of appeals. As noted, see supra note 1, in Puerto Rican Cement, the First Circuit rejected a claim that modifications to a cement kiln, which made production more efficient and decreased the hourly emissions rate but could increase the plant's utilization rate, such that actual emissions to the atmosphere might increase, were exempt from PSD. The company argued that the project fell under the PSD regulatory exclusion for changes that result in an "increase in the hours of operation or in the production rate." See 889 F.2d at 298. Similarly, in WEPCO, where the company was making "like-kind" replacements of components to restore the original design capacity of the plant, there was no increase in emissions per unit of output; rather, for PSD purposes, the emissions increase was attributable to increased utilization. The Seventh Circuit rejected the company's reliance on the exclusion for increased hours of operation/rates of production. See 893 F.2d at 916 n. 11.

In the submitted materials, utility representatives claim that EPA has previously indicated that the utilities may undertake facility restorations without considering NSR. In 1995, industry encouraged EPA to propose to amend the NSR rules to include a "restoration" exclusion for any change that enabled a deteriorated unit to increase its emissions, as long as the unit did not exceed its highest recent (i.e., in the last 5 years) achievable capacity. EPA responded by saying that it intended to propose a number of flexible mechanisms to allow sources to make changes without triggering NSR. The Agency also said, "EPA believes that the routine maintenance exclusion already included in the existing NSR regulations also has the effect of excluding 'routine restorations.'" Letter from Mary D. Nichols, Assistant Administrator for Air and Radiation, to William R. Lewis, Morgan, Lewis and Bockius, attachment at 19 (May 31, 1995). Some in industry quarters suggest that this sentence indicates EPA's interpretation that restoration activities are, by definition, exempt. See UARG Comments at 17 ("In 1995, [EPA] confirmed that no special rule was needed for industrial 'restoration' projects because such projects were covered already under the 'routine maintenance' exclusion."). These claims are incorrect. Rather, EPA's statement says merely that "routine restorations," not all "restorations," are exempt. Thus, EPA's remark simply is tautological; it says that to the extent the restoration is itself "routine," the current exclusion for "routine" activity will exempt it from review.[10]

c. Assertion that EPA Expects No Change to Trigger NSPS Modification Provision

Detroit Edison also maintains that several EPA documents indicate that the Agency believed until recently that utility modifications would generally avoid NSR, and that these documents therefore reveal an expansive understanding of the exemption for routine activity. In particular, the UARG Comments highlight a General Accounting Office (GAO) report created when Congress was considering the acid rain program,[11] a letter to Senator Byrd from EPA regarding a proposed NSPS, and the preamble to the proposed NSPS.[12] Although none of these documents discuss the scope of the routine maintenance, repair, and replacement exemption,

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10. For example, past piecemeal repairs and replacement of individual rotor blades at Monroe presumably restored some portion of the efficiency lost since the last scheduled outage. While not the subject of this determination, it appears that those activities – which as explained above were far different from the proposed Dense Pack upgrade – are more likely to be properly characterized as excluded "routine restorations."

11. UNITED STATES GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/RCED-90-200, ELECTRICITY SUPPLY: OLDER PLANTS' IMPACT ON RELIABILITY AND AIR QUALITY (1990).

12. The submissions also refer to an article written by EPA staff. This document warrants no discussion; it does not represent Agency opinion, as noted in the cited article. See James DeMocker et. al, Extended Lifetimes for Coal-fired Power Plants: Effect Upon Air Quality, PUBLIC UTILITIES FORTNIGHTLY at 30 n.* (Mar. 20, 1986). Moreover, the article is silent on the question at issue here -- when certain activity is routine -- and therefore would not be relevant even if it did speak for EPA.

industry points to them as evidence that EPA believed that NSR would apply to electric utilities only rarely.

The cited documents do not remotely suggest a broad EPA interpretation of the routineness exemption. First, although the GAO report contains a number of statements that suggest that EPA did not expect many utilities to trigger the NSPS or PSD modification rules, it does not suggest how broadly or narrowly the exclusion for routine activity has been interpreted; further, some statements in the report are best read as reflecting a narrow scope to the exclusion. GAO Report at 28, 30 (acknowledging that "life extension projects involve physical or operational changes to power plants" and distinguishing between projects aimed at restoring generating capacity and those which prevent plant deterioration). In addition, as noted above, the PSD regulations provide broad leeway for sources to avoid new source requirements by making offsetting emissions reductions at the source even when undertaking extensive physical or operational changes that, standing alone, would result in emissions increases. In many circumstances, such "netting out" of review is a more cost-effective strategy than obtaining a PSD permit. Moreover, at the time of the 1990 CAA Amendments, any statement or assumption EPA made regarding whether electric utilities could trigger NSR was based on information provided by industry at that time. The power plant undertaking a physical or operational change is responsible for obtaining the necessary regulatory approvals from each agency that regulates it. State and federal environmental agencies do not regularly review submissions to public utility commissions, the Federal Energy Regulatory Commission, a pipeline authority or a local zoning board; nor are those agencies charged with the authority to require CAA permits. As a result, EPA, as well as states, were unaware that activities that were under way at utilities would in fact increase emissions and thus trigger NSR. Although EPA's conclusions were reasonable based on the information EPA had at the time, EPA's statements might have been different based on more complete information, including information from facilities requesting applicability determinations.

Second, the utilities point to a letter to Senator Byrd from OAQPS Director John Seitz regarding potential revisions to the NSPS for steam generating units and to the preamble to a 1997 proposed rule on the same topic. Both documents indicate that EPA expected few, if any, existing units to become subject to the proposed NSPS as a result of being modified. Again, these documents do not suggest that the reason EPA had such an expectation was because of a broad interpretation of the exemption for routine activity. Indeed, the preamble to which industry refers has a lengthy discussion of the reasons why existing units would avoid the NSPS for modifications, but notably omits the "routine" exclusion. See 62 Fed. Reg. 36947, 36957 (July 9, 1997).[13]

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13. In addition, the UARG Comments claim that a "key" factor in the D.C. Circuit's recent vacatur of the fossil-fuel boiler NSPS for modified units was that some EPA offices viewed quite a bit of "maintenance" activity as potentially covered by the modification provision and others thought that few, if any, changes would trigger the NSPS. UARG Comments at 3 n.8. Research has revealed no support for this assertion. The court's order in the case is brief and

(continued...)

d. Assertion that Industry Practice Defines Routineness

The submitted materials also seem to contend that if a particular industry sector has an established practice of undertaking certain construction activity, no matter how infrequent, costly, or major, that industry practice is "routine." See UARG Comments at 37 ("[E]lectric utilities undertake maintenance, repair and replacement activities pursuant to their legal obligation to provide a safe and reliable source of electricity. This defines what is 'routine' for this industry.") It is true that EPA has stated that the "determination of whether the repair or replacement of a particular item of equipment is 'routine' under the NSR regulations, while made on a case-by-case basis, must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category." 57 Fed. Reg. at 32326. However, this statement merely recognizes that a piece of equipment may be more integral, costly, or less frequently replaced at one kind of facility than at another. Accordingly, although it may not be routine for one industry to replace or repair certain equipment or undertake certain maintenance activity, similar construction might be routine in a different industry. As a result, EPA has historically considered whether a typical source in the relevant industry undertakes the proposed activity as a routine matter. See, e.g., 40 C.F.R. §60.14(e)(1) (NSPS regulations require EPA determination that activity is "routine for a source category" to be exempt). This does not mean, however, that whatever activity members of a particular industry have done – no matter how infrequent, costly, sizable, or capable of expanding the source's operations or extending its useful life – is necessarily routine.

B. Analysis of "Routine" Maintenance, Repair or Replacement at the Monroe Plant

Looking at the nature, extent, purpose, frequency and cost of the project, along with other relevant factors in light of the framework discussed above, EPA concludes that the proposed Dense Pack project is a non-routine physical change. In sum, although utilities typically perform maintenance, repair and replacement of individual deteriorated turbine blades about once every four years, the reconfiguration and upgrade of a turbine's entire high-pressure section (including all of the blades) is a significant departure from necessary maintenance operations aimed at keeping the turbine in ordinary working condition, and is rarely performed at a typical utility. Detroit Edison expects the new Dense Pack configuration to substantially increase the unit's ability to convert steam to electricity over its original design and the project will reduce the rate of blade efficiency deterioration by 70%. Moreover, the new blades will alter the inspection and replacement program of worn blades, allowing inspection and replacement to occur every 10 years instead of 4 years. Finally, the project requires a significant capital expenditure of $12

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13. (...continued)
does not suggest a reason for its disposition of the matter, except that the court believed that the NSPS for modified boilers was "seriously deficient." Lignite Energy Council v. EPA, No. 98-1525 (D.C. Cir. Sept. 21, 1999).

million, which Detroit Edison states is triple the cost of replacing the worn blades with ones of the same design, and which vastly exceeds prior blade and rotor maintenance costs. A more detailed application of the relevant factors to the information that Detroit Edison has submitted regarding the Dense Pack project follows.

Nature and Extent

Detroit Edison seeks to replace the entire high-pressure section of two turbines to allow for use of a new type of turbine blade and to reconfigure the design to improve efficiency. This includes reconfiguration of blades in the high-pressure sections of the two units, including new parts and additional stages. The turbine – in particular the high-pressure section – is an integral and major component of an electric generating facility. Furthermore, the proposed change will be of considerable importance to the operation of the facility because, among other options, it will enable the units to produce more electricity with the same coal usage, boiler heat input and steam flow, and allows operation of the units with less maintenance. In addition, by making operation of the affected units more efficient, the Dense Pack upgrade will provide an economic incentive to increase operations at the plant.

Several other facts that EPA has found telling in past decisions and guidance also indicate that the Dense Pack upgrade would not be routine. First, the project cannot be performed during the full functioning of the plant and instead would require the affected units to be shut down. Second, the project would involve the addition of parts not previously used. Third, the project could not be completed with parts typically stored on site. Finally, Detroit Edison plans to capitalize 100% of the cost of the project.

Purpose

Replacement of currently deteriorated blades with blades of the same design would restore only 2% of the efficiency that has been lost as the equipment has aged, leaving the units 5% below their original efficiency rating. The Dense Pack project, however, would increase efficiency of the high-pressure sections of the turbines over current levels by 12%, and overall efficiency of the turbines by 4.5%. The new configuration could reduce efficiency deterioration by 70%.

Thus, the Dense Pack project will not simply maintain the equipment at the current state, but will enhance the operation of the Monroe Power plant by recovering the accumulated lost efficiency, increasing the efficiency over the original design, and decreasing the rate of turbine blade deterioration in the high pressure section. This efficiency enhancement and decrease in deterioration rate would in turn substantially enhance the operational capabilities of the affected units, by providing an economic basis for increased utilization. As discussed below, Detroit Edison claims that it does not intend to use the unit more in the future as a result of the Dense Pack project, but that does not change the fact that the project would enable it to do so.

Frequency

Turbine upgrades like the Dense Pack project are performed rarely, if ever, in the course of a utility source's life. Detroit Edison has not provided any information to suggest that individual facilities in the industry frequently conduct a complete replacement of the high pressure section of a utility steam turbine, relying instead on two claims: (1) that utilities commonly perform turbine maintenance activity; and (2) that it estimates that projects "similar" to the Dense Pack have been performed at a number of utilities. Neither of these claims addresses the central question – whether it is industry practice that a typical facility will frequently conduct the project in question. The only available information -- Detroit Edison's experience – suggests that projects like the Dense Pack are performed infrequently at individual sources; this project has never been performed previously at Monroe and will greatly increase the time between "overhauls" of the high pressure section.

Cost

Detroit Edison expects the Dense Pack project to cost approximately $12 million. Detroit Edison has estimated that replacement of the current blades with blades of the same design would cost approximately $2 million per unit. Generally speaking, a new plant costs approximately $2,000 per kilowatt. Therefore, a new 750 megawatt unit would cost about $1.5 billion.

An absolute cost of $12 million constitutes a significant cost, which tends to make this project non-routine. Detroit Edison argues that the cost of the Dense Pack project is significantly less than the cost of the Port Washington project at issue in the WEPCO case. In WEPCO, the estimated cost of the life extension project was $87.5 million, at least $45.6 million of which was capital costs. Clay Memo at 6. EPA acknowledges that this cost is well in excess of the proposed Dense Pack project, especially considering inflation. However, as the Agency noted in 1988, WEPCO's activity was "far from" routine,id. at 3, and the facts of that case should be considered in that context. By contrast, EPA has determined that a proposed project costing $905,000 was non-routine. Letter from Howekamp to Connery at 5. Considering these two precedents, EPA believes that the $12 million expenditure in this case, all of which is capital in nature, supports a determination that the proposed project is non-routine.

Although the relative cost of the Dense Pack project, when compared with replacing the entire electric generating facility, is small, it is orders of magnitude larger than other blade maintenance activity Detroit Edison has conducted in the past. For instance, it appears that the company spent $18,700, $33,100, and $7,900 to replace high-pressure rotors in three projects in 1981 and 1982. Further, the project is significantly more costly than simply replacing deteriorated blades today; Detroit Edison acknowledges that the Dense Pack upgrade would cost three times more than its alternative blade repair and replacement project.

V. Emissions Increase

Since the Dense Pack project constitutes a physical change, EPA must consider whether it would result in a significant net emissions increase. Before providing its analysis, once again EPA will review what the regulations require. Thus, the following discussion provides a context for the analysis of the project that follows.

A. Regulatory Requirements

If a physical change or change in the method of operation is not "routine," it still does not trigger PSD unless it results in a significant net emissions increase. This involves comparing recent pre-change, or "baseline", actual emissions to a projection of future actual emissions following the change. A source's pre-change level of actual emissions from a given unit is "the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the [date of the change] and which is representative of normal source operation." Id. § 52.21(b)(21)(ii). This figure must be compared to the source's post-change emissions; however, because NSR is a preconstruction program, one must project the unit's future emissions. For units that are not "electric utility steam generating units," EPA's rules require that for units that have "not begun normal operations," i.e., units that will undertake a non-excluded physical or operational change, the post-change emissions "shall equal the potential to emit of the unit," which is the "maximum capacity of a stationary source to emit a pollutant under its physical and operational design," but which also accounts for pollution controls and permit restrictions that limit lawful emissions to a level below the maximum physical capacity. Id. § 52.21(b)(4).[14] If a particular change would, standing alone, increase actual emissions by more than a "significant" amount, see id. § 52.21(b)(23), the change is subject to PSD, unless other activity at the source renders the net emissions effect of the change insignificant when considered together with contemporaneous (generally within the past five years) emissions increases and decreases at the source. See id. § 52.21(b)(3) (defining "net emissions increase").

For electric utility steam generating units, the post-change emission increase calculation is

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14. Under current regulations, changes to a unit that are not routine nor subject to one of the other NSR exemptions are considered to be of such significance that pre-change emissions should not be relied on in projecting post-change emissions. For such units, "normal operations"refers to operations after the change, and are deemed not to have begun. The regulations initially presume that such units will operate year-round at full capacity, but a source owner is free to overcome the presumption by agreeing to limit its potential to emit to any level desired through enforceable restrictions on operations or the use of pollution controls. For example, if limiting the potential to emit results in an insignificant change in emissions, the source can avoid PSD applicability. See 63 Fed. Reg. 39858 (July 24, 1998) (Notice of Availability); see also 45 Fed. Reg. 52676, 52688-89. If business plans later change and the owner desires to relax those restrictions and obtain a PSD permit at that later time, it may do so. See 45 FR 52689; 54 FR 27274, 27280.

governed by regulations adopted in 1992 (57 Fed. Reg. 32314, July 21, 1992), commonly referred to as the "WEPCO rule." Although the WEPCO rule did not change the regulatory provision that establishes a unit's pre-change emissions, EPA announced that it would view any consecutive two-year period during the preceding five years as presumptively reflective of "normal source operations." See 57 Fed. Reg. at 32324-25. In addition, EPA amended the regulations regarding a utility unit's post-change emissions in two ways. First, the rules allow utilities to project future emissions resulting from a particular change without committing to a permit restriction limiting the unit's potential to emit to a level below its maximum capacity to emit a pollutant,[15] and they provide that emissions increases independent of the physical or operational change may be discounted from the post-change emissions of the unit. A utility making a particular change, instead of accepting permit restrictions on the potential of the changed unit to emit a particular pollutant, may avoid PSD if its projection of "representative actual annual emissions" following the change is not significantly greater than its pre-change emissions, but only if the source "maintains and submits to the Administrator [or relevant state permitting authority] on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase." E.g., 40 C.F.R. § 52.21(b)(21)(v). Second, in evaluating the source's claimed exemption from PSD, the permitting authority must "[c]onsider all relevant information, including, but not limited to, historical operational data, the company's own representations, filings with the State or Federal regulatory authorities, and compliance plans under title IV of the Clean Air Act. . . ." Id. § 52.21(b)(33)(i). The permitting authority must discount any increase "that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole." Id. § 52.21(b)(33)(ii). Nevertheless, if an emissions increase could not have occurred "but for the physical or operational change," the increase must be considered to result from the change. See 57 Fed. Reg. at 32327.

Where the end result of an emissions increase analysis for electric utilities is a projection accepted by the permitting authority that emissions would not increase as a consequence of a particular change, the rules call for an initial determination that the change would not be a major modification subject to PSD. See Letter from David P. Howekamp, Air Division, Reg. IX, to

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15. We are aware, as Detroit Edison states in its initial applicability determination request, that EPA Region VII previously has suggested that a utility undertaking a change to a part of the source other than the boiler may not be entitled to take advantage of the provision that allows for a forecast of future emissions without committing to a present limitation on the source's potential to emit. We have reviewed Region VII's discussion of the matter and the applicable regulations, and we conclude that Detroit Edison may use this provision to calculate future emissions from the boilers, even though it is making changes at the turbines. The plain language of the regulation is categorical; irrespective of where a change takes place, the post-change emissions of the electric utility steam generating unit – which certainly includes the boiler – must be determined using the "representative actual annual emissions" approach. See 40 C.F.R. § 52.21(b)(21)(v).

Richard K. McQuain, HEI Power Corp., at 1-2 (undated) (describing WEPCO rule as conferring conditional exemption from PSD where projected emissions increase is insignificant). However, if the information that the source must submit for the requisite number of years following the change demonstrates that emissions have in fact increased as a result of the change, the source becomes subject to PSD at that time. See 40 C.F.R. § 52.21(b)(21)(v); 57 Fed. Reg. at 32325 ("If . . . the reviewing authority determines that the source's emissions have in fact increased significantly over baseline levels as a result of the change, the source would become subject to PSD requirements at that time.")

B. Analysis of Significant Net Emissions Increase at the Monroe Plant

Because the Dense Pack project would be a physical change to a major stationary source, Detroit Edison must estimate whether the change would result in a significant net emissions increase to determine whether it must undergo PSD review. 40 C.F.R. § 52.21(b)(2)(i). According to the submission, Detroit Edison asserts that emissions will not increase as a result of the project. As discussed below, EPA accepts for purposes of this determination Detroit Edison's representation that emissions will not increase as a result of the project, and concludes that the Dense Pack upgrade will not trigger PSD, provided that, prior to beginning construction, the company validates its representation by developing and submitting to the permitting agency a calculation of "baseline" actual emissions and a projection of future actual emissions following the project.

Detroit Edison maintains that emissions will not increase as a result of this project because it concludes that one of two consequences will follow the upgrade. First, Detroit Edison claims that because the change would increase efficiency, it would allow increased electricity generation using the same amount of coal, boiler heat input and steam flow while producing the same level of emissions as currently emitted. Alternatively, Detroit Edison claims the project would enable it to generate the same amount of electricity it currently generates using less coal, boiler heat input and steam flow, resulting in reduced emissions. Detroit Edison rejects the third possibility -- that it would use the units more, and increase emissions at the plant, as a result of the blade replacement. Detroit Edison states that these units already are at the top of the loading order and had a capacity factor of approximately 85% for 1998. Thus, the company asserts, any increase in use would be the result of demand or unforeseen outages, which could and would have occurred regardless of whether or not Detroit Edison proceeds with the Dense Pack project. The company has not, however, provided any specific projections of future operations and emissions to EPA to support its claims regarding emissions levels.

EPA disagrees that the dispatch position of the Monroe plant necessarily means that the Dense Pack project would not result in increased use, and hence, increased emissions. Given the information provided by the company showing that there is some fluctuation in annual use and that Units 1 and 4 are not operated at their maximum physical capacity, the fact that Monroe is at the top of the loading order is insufficient to demonstrate that the significant increase in efficiency associated with the Dense Pack project, and the corresponding decrease in the cost of producing

electricity, would not result in increased use and emissions. The possibility that Detroit Edison would take advantage of Monroe's increased efficiency to sell additional power in deregulated utility markets beyond its regular service area is an additional reason that the Dense Pack project may well lead to increased emissions. Accordingly, based on the information provided, EPA cannot agree at this time that any future increased emissions at the Monroe plant due to increased use should be attributed to demand growth (as that term is used in the PSD regulations) or other factors not causally related to the Dense Pack project.

EPA notes in this regard that the large size of the Monroe units means that only a small increase in use could result in emissions increases that are significant for PSD purposes. For example, if Detroit Edison decides to run the Monroe plant even 1% more due to the improved efficiency, the resulting increase in emissions would be well above the significance threshold. If a one to five percent increase in operation were to result from the Dense Pack project, increases on the order of 160-800 tons of NOx and 400-2000 tons of SO2 would occur, each of which would be considered "significant," and trigger PSD absent sufficient offsetting contemporaneous emission reductions. See 40 C.F.R. § 52.21(b)(23)(i) (defining 40 tons per year emission increases for sulfur dioxide and nitrogen oxides as "significant").

In determining whether a nonexempt physical or operational change at an electric utility steam generating unit will result in a significant net emissions increase, the applicable PSD regulations at 40 C.F.R. § 52.21(b)(21)(v) and (b)(33) call for a calculation of pre-change "baseline" actual emissions and a projection of future actual emissions for the two year period after the change (or another two year period that is more representative of normal post-change operations). Detroit Edison has not supplied such a projection, perhaps in reliance on its position that the Dense Pack project would be exempted as routine. The company has represented, however, that "the Dense Pack would not result in an increase in the number of hours these units are expected to be operated." EPA has no specific information disputing that assertion, and so is willing to accept Detroit Edison's representation. Nevertheless, until the company provides the calculation and projection called for by the regulations to verify its projection of no increase in actual emissions, our determination is provisional. Detroit Edison should submit these figures to the Michigan Department of Environmental Quality prior to the beginning of construction.

The PSD regulations also require Detroit Edison to maintain and submit to the delegated permitting agency, for a period of 5 years from the date the units resume regular operation following completion of the Dense Pack project, information demonstrating that the project did not result in an emissions increase. To adequately track post-change emissions, EPA expects that this information must include records on annual fuel use, hours of operation, and fuel sulfur content. In making these calculations, Detroit Edison may exclude emissions increases that are caused by other factors, for example, emissions increases that it demonstrates are due to variability in control technology performance or coal characteristics. In addition, when calculating emission increases, under current regulations Detroit Edison may exclude that portion of its emissions attributable to increased use at the unit due to the growth in electrical demand for the utility system as a whole since the baseline period. See 40 C.F.R. § 52.21(b)(33)(ii).

Finally, EPA notes that regardless of whether PSD review is triggered due to the Dense Pack project, Detroit Edison remains responsible for compliance with all other applicable federal, state, and local air pollution regulations.

VI. Conclusion

For the reasons delineated above, EPA concludes that the changes proposed by Detroit Edison would not be routine. Detroit Edison's submissions do not demonstrate that projects such as the Dense Pack are frequent, inexpensive, or done for the purpose of maintaining the facility in its present condition. Therefore, the Agency determines that the Dense Pack upgrade would be a "physical change," as that term is used in the NSR regulations. EPA disagrees with Detroit Edison's claims that the Dense Pack project is eligible for the exclusion from PSD permitting for routine maintenance, repair, and replacement. The determination of whether a proposed physical change is "routine" is a case-specific determination which takes into consideration the nature, extent, purpose, frequency, cost of the work, as well as other relevant factors. After carefully reviewing all the available information, in light of the relevant factors, EPA has determined that the proposed project would not be "routine."

The PSD regulations (under the provisions commonly known as the "WEPCO rule") allow a source undertaking a nonroutine change that could affect emissions at an electric utility steam generating unit to lawfully avoid the major source permitting process by using the unit's representative actual annual emissions to calculate emissions following the change. Detroit Edison contends that representative actual annual emissions following the Dense Pack project will not be greater than its pre-change actual emissions, because the project will not result in increased use of the units. Therefore, Detroit Edison may avoid major PSD permitting to the extent it documents its pre-change baseline emissions and submits information following the change to confirm its pre-change projection. If Detroit Edison fails to comply with the reporting requirements of the WEPCO rule or if the submitted information indicates that emissions have increased as a consequence of the change, it will be required to obtain a PSD permit for the Dense Pack project.

To: Jackson, Ryan[jackson.ryan@epa.gov]; Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: White, Elizabeth[white.elizabeth@epa.gov]
From: Hope, Brian
Sent: Thur 12/7/2017 5:32:56 PM
Subject: Signed NSR Memo
NSR Policy Memo.12.7.17.pdf

Let me know if you need anything else. Thanks.

- Brian

Brian T. Hope

Deputy Director

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E. SCOTT PRUITT
ADMINISTRATOR

December 7, 2017

MEMORANDUM

SUBJECT: New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability

FROM: E. Scott Pruitt

TO: Regional Administrators

I. Introduction and Purpose of Memorandum

In accordance with presidential priorities for streamlining regulatory permitting requirements for manufacturing and other types of facilities, the U.S. Environmental Protection Agency is conducting a review of the agency's implementation of the preconstruction permitting requirements under the Clean Air Act, which are generally known as the New Source Review program. This review will involve an assessment of opportunities for the EPA to make improvements by clarifying or revising the EPA regulations implementing the NSR program, providing technical support and oversight to the states that administer the program and evaluating the agency's enforcement of the NSR requirements. With respect to the latter, there continue to be disputes pending in the United States courts in NSR enforcement cases that began before the EPA initiated the current review of the NSR program. The United States is represented in those matters by the Department of Justice and the Office of Solicitor General. As those cases proceed toward resolution, the EPA continues to have implementation and oversight responsibilities for the NSR program.

Based on an initial assessment, I understand that two recent appellate court decisions[1] in the pending enforcement proceeding against DTE Energy have created uncertainty regarding the applicability of NSR permitting requirements in circumstances where the owner or operator of an existing major stationary source projects that proposed construction will not cause an increase in actual emissions that triggers NSR requirements. As we begin the EPA's current review of the

[1] These appellate decisions are *U.S. v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013) and *U.S. v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017).

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NSR program, this memorandum communicates how the EPA intends to apply and enforce certain aspects of the applicability provisions of the NSR regulations that have been addressed in these appellate decisions.

In particular, this memorandum addresses the EPA's intended approach concerning the procedures contained in the NSR Reform Rules[2] (and approved state regulations that reflect the content of those rules) for sources that have used or intend to use "projected actual emissions" in determining NSR applicability and the associated pre- and post-project source obligations. While this memorandum describes our current intended approach for future matters, decisions about how to proceed in ongoing enforcement matters will be made on a case-by-case basis. We believe this memorandum is necessary to provide greater clarity for sources and states implementing the NSR regulations. The guidance is also generally consistent with the NSR Reform Rules and with EPA objectives and ongoing efforts to clarify and streamline the NSR program requirements and reduce burden on regulated sources in accordance with recent Presidential actions.[3]

The remainder of this memorandum is organized into two sections. Section II contains relevant CAA, regulatory and litigation background. Section III contains a discussion of the issues raised by the DTE litigation and addresses the EPA's current intended approach concerning the following specific topics: 1) consideration of post-project emissions management in determining NSR applicability; 2) the role of post-project actual emissions in major modification applicability; 3) the EPA oversight and enforcement of pre-project NSR applicability analyses involving the actual-to-projected-actual applicability test; and 4) the role of EPA-approved state and local NSR programs in implementing NSR requirements.

This memorandum explains how the EPA intends to apply and enforce certain requirements of the NSR regulations as we begin review of that program. This document is not a rule or regulation, and the guidance it contains may not apply to a particular situation based upon the individual facts and circumstances. This memorandum does not change or substitute for any law, regulation or other legally binding requirement and is not legally enforceable. This memorandum is not final agency action, but merely clarifies the EPA's current understanding regarding certain elements of the NSR regulations.

II. Background on CAA and Regulatory Provisions and DTE Litigation

A. Relevant CAA and EPA Regulatory Provisions

The NSR provisions of the CAA and of the EPA's implementing regulations require new major stationary sources and major modifications at existing major stationary sources to, among other things, obtain an air quality permit before beginning construction. This permitting process for major stationary sources is required whether the major source or major modification is planned for an area where the national ambient air quality standards (NAAQS) are exceeded

[2] In 2002, the EPA issued a final rule that revised the regulations governing the major NSR program. 67 FR 80186. We refer generally to these rule provisions as "NSR Reform."

[3] *See e.g.*, Presidential Memorandum: Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (January 24, 2017); Executive Order 13777: Enforcing the Regulatory Reform Agenda (February 24, 2017).

(nonattainment areas) or an area where the NAAQS have not been exceeded (attainment and unclassifiable areas). In general, permits for sources in attainment areas and for other pollutants regulated under the major source program are referred to as prevention of significant deterioration (PSD) permits, while permits for major sources emitting nonattainment pollutants and located in nonattainment areas are referred to as nonattainment NSR (NNSR) permits. The entire preconstruction permitting program, which includes the PSD and the NNSR permitting programs, is referred to as the NSR program.[4]

The CAA defines a "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). A "major modification" is defined in the regulations as "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase (as defined in paragraph (b)(40) of this section) of a regulated NSR pollutant (as defined in paragraph (b)(50) of this section); and a significant net emissions increase of that pollutant from the major stationary source." 40 C.F.R. § 52.21(b)(2)(i).

The NSR applicability procedures in the regulations reaffirm the role of the "project" emissions increase[5] and "net emissions increase"[6] in determining major modification applicability: "...a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases – a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*a*).

Prior to beginning construction of a project the owner or operator of the major stationary source must calculate the emissions increases that it projects will be caused by the project and potentially the net emissions increase to determine if NSR permitting is required. The procedure for calculating whether a significant emissions increase will occur as a result of a modification is emission unit specific and depends upon whether the emissions unit is new or existing. For new emissions units, increases are calculated using the "actual-to-potential" test, and for existing emissions units, increases are calculated using the "actual-to-projected-actual" applicability test.

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[4] The CAA requirements for PSD programs set forth under at 42 U.S.C. §§ 7470-7479 are implemented by the EPA's PSD regulations found at 40 C.F.R. § 51.166 (minimum requirements for an approvable PSD State Implementation Plan) and 40 C.F.R. § 52.21 (PSD permitting program for permits issued under the EPA's federal permitting authority). The CAA sets forth requirements for state implementation plans for nonattainment areas at 42 U.S.C. §§ 7501-7515, and the general provisions include NNSR permitting requirements at 42 U.S.C. §§ 7502(c)(5) and 7503. The CAA's NNSR permitting requirements are implemented by the EPA's NNSR regulations found at 40 C.F.R. § 51.165, § 52.24 and part 51 of Appendix S. This memorandum cites certain definitions and requirements in the federal PSD regulations at 40 C.F.R. § 52.21. However, the other NSR regulations identified contain analogous definitions and requirements, and the statements in this memorandum also apply to those analogous provisions.

[5] A "project" is defined as "a physical change in, or change in the method of operation of, an existing major stationary source." 40 C.F.R § 52.21(b)(52).

[6] The net emissions increase is calculated as the sum of the project emissions increase, calculated pursuant to 40 C.F.R. § 52.21(a)(2)(iv), and any other increases and decreases in actual emissions at the major stationary source that are contemporaneous and otherwise creditable. *See* 40 C.F.R. § 52.21(b)(3).

See 40 C.F.R § 52.21(a)(2)(iv). Under both applicability tests, pre-project actual emissions are established using "baseline actual emissions," which are defined specifically for existing electric utility steam generating units and separately for all other existing emissions units. *See* 40 C.F.R § 52.21(b)(48). Under the actual-to-potential test, an emissions increase is calculated as the difference between the potential to emit (as defined at 40 C.F.R § 52.21(b)(4)) following completion of the project and the baseline actual emissions. Under the actual-to-projected-actual applicability test, an emissions increase is calculated as the difference between the projected actual emissions (as defined at 40 C.F.R § 52.21(b)(41)) and the baseline actual emissions.[7]

The focus of this memorandum is on the actual-to-projected-actual applicability test and associated requirements in the NSR regulations. "Projected actual emissions" is defined as "the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated NSR pollutant in any one of the 5 years following the date the unit resumes regular operation after the project, or in any one of the 10 years following that date, if the project involves increasing the emissions unit's design capacity or its potential to emit that regulated NSR pollutant and full utilization of the unit would result in a significant emissions increase or a significant net emissions increase at the major stationary source." 40 C.F.R § 52.21(b)(41)(i). In making a projection, the owner or operator "[s]hall consider all relevant information, including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the State or Federal regulatory authorities, and compliance plans under the approved State Implementation Plan." 40 C.F.R § 52.21(b)(41)(ii)(*a*). In order to determine the projected increase that results from the particular change consistent with the definition of "major modification," the owner or operator "[s]hall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions under paragraph (b)(48) of this section and that are also unrelated to the particular project, including any increased utilization due to product demand growth."[8] 40 C.F.R § 52.21(b)(41)(ii)(*c*). Finally, the rules contain objective calculation requirements (e.g. for electric utility steam generating units, baseline actual emissions must be based on a consecutive 24-month period in the 5-year period immediately preceding the project, and in order not to trigger NSR permitting requirements, the calculated emissions increase may not equal or exceed numerical "significance" thresholds). *See* 40 C.F.R. §52.21(b)(23), (48).

With respect to the role of post-project actual emissions in the major modification applicability provisions, the regulations state the following: "Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*b*). In addition, the regulations contain specific recordkeeping, monitoring and reporting provisions set forth at 40 C.F.R. § 52.21(r)(6) that apply in circumstances where there is a "reasonable

[7] In lieu of using projected actual emissions, owners or operators may use potential to emit. *See* 40 C.F.R § 52.21(b)(41)(ii)(*d*).

[8] This provision is sometimes referred to as the "demand growth exclusion," when used in the context of utilities or the "independent factors exclusion," when used in the context of other manufacturing operations, and qualifying emissions are sometimes referred to as "excludable emissions." There is no presumption that an emissions increase following that change was caused by the change, but rather, this is the analysis required under §52.21(b)(41)(ii)(c).

possibility," as that term is defined at 40 C.F.R. § 52.21(r)(6)(vi), that a project that is not projected to cause a significant emissions increase may nevertheless result in an actual significant emissions increase of a regulated NSR pollutant.[9] Depending on the reasonable possibility criteria applicable to a project and the type of emissions unit(s) involved, owners or operators must comply with one or more of the following requirements: 1) document and maintain a pre-project record of the NSR applicability information identified at 40 C.F.R. §52.21(r)(6)(i); 2) for electric utility steam generating units only, submit the information set out in paragraph (r)(6)(i); 3) monitor and record emissions, on a calendar-year basis, for a period of five or 10 years after the unit resumes regular operations after the change (depending on whether there is an increase in the design capacity or potential to emit); 4) for electric utility steam generating units only, submit a report of annual emissions for each year that monitoring is required; and 5) for all other units, submit a report if annual emissions exceed the baseline actual emissions by a significant amount and if such emissions differ from the pre-construction projection. *See* 40 C.F.R. § 52.21(r)(6)(i) - (v). For projects subject to 5-year post-change emissions tracking, the EPA indicated in the NSR Reform rule preamble that it would "presume that any increases that occur after 5 years are not associated with the physical or operational changes."[10]

B. DTE Litigation

Since 2010, the EPA has been involved in an enforcement action and litigation concerning a construction project at the DTE Monroe, Michigan power plant. At issue in that litigation has been a dispute between the EPA and DTE on the relationship between the requirements in the regulations that govern pre-project NSR emission projections and the role of post-project emissions monitoring.

The DTE litigation has resulted in two separate decisions by the same panel of three judges on the U.S. Court of Appeals for the Sixth Circuit. Neither of these decisions were unanimous, and in the second decision, each judge wrote a separate opinion. In the first decision, two of the three judges agreed that the EPA could pursue enforcement based solely on a claim that the source had failed to properly project, in accordance with the regulations, future emissions, even though actual emissions from the source had not increased after the construction was completed and the source resumed operation. *See U.S. v. DTE Energy Co.*, 711 F.3d 643, 649-650, 652 (6th Cir. 2013). In allowing enforcement based solely on violations of EPA regulations governing future emission projections, the majority opinion cautioned against EPA "second guessing" a projection. The third judge dissented based on her view that there was no enforceable violation of the EPA's projection regulations when there was no post-construction emissions increase. *See id.* at 652-53. After the case reached the Sixth Circuit for the second time, the two judges who had agreed in the first case (that the EPA could pursue enforcement based solely on an allegedly improper projection) were unable to agree on the extent to which the EPA could "second guess" such a projection. *United States v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017). One of these two judges concluded that DTE had satisfied the basic requirements for making projections and the other concluded DTE had not. *Compare id.* at 738-740 *with id.* at 751-55. The third judge (the same one who dissented in the first case) concluded that she was required to follow the majority holding in the first case that the EPA could pursue enforcement based solely on an improper projection and then sided with the

[9] These provisions are sometimes referred to as the "reasonable possibility" rule provisions.
[10] 67 FR 80197 (December 31, 2002).

judge who found DTE had not adequately justified its projection (while declining to support the parts of her colleague's opinion that could be read to expand the majority opinion in the first case). *See id.* at 742.

The matters at issue in the DTE litigation are complex, and the appellate court decisions have left ambiguity regarding the scope of the applicable regulations and what sources must do to comply. Further, the Supreme Court has been asked to review the second appellate court opinion. Considering this uncertainty, the EPA believes it would be helpful to explain to stakeholders how the EPA plans to proceed in implementing and exercising its authority under those regulations pending further review of these issues by the EPA.

III. Discussion

As described previously, the NSR regulations require owners or operators to perform a pre-construction applicability analysis to determine whether a proposed project would result in a significant emissions increase and a significant net emissions increase, thus triggering the requirement to obtain an NSR permit. The regulations also specify the information used in that analysis that, when certain criteria in the "reasonable possibility" rule provisions are met, shall be documented, maintained and in certain cases submitted to the reviewing authority prior to beginning construction. *See* 40 C.F.R. §§ 52.21(a)(2), 52.21(r)(6)(i), (ii). If required, the pre-project record must contain: 1) a description of the project; 2) identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and 3) a description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under paragraph (b)(41)(ii)(c) and an explanation for why such amount was excluded and any netting calculations,[11] if applicable. *See* 40 C.F.R. § 52.21(r)(6)(i).

One issue that has arisen with respect to determining projected actual emissions resulting from a proposed project is whether it is permissible under the regulations for an owner or operator to factor into the projection an intent to actively manage future emissions from the project on an ongoing basis to prevent a significant emissions increase or a significant net emissions increase from occurring. The EPA notes that the rule language specifically provides that "all relevant information" shall be considered in making a projection. *See* 40 C.F.R § 52.21(b)(41)(ii)(*a*). Pending further review of the issues described above by the EPA, the EPA intends to apply the NSR regulations in accordance with this language such that the intent of an owner or operator to manage emissions from a unit in that manner after a project is completed represents relevant information in the context of projecting future actual emissions from that unit that could be considered along with other relevant information in making an emissions projection, as provided in the NSR regulations.

In finalizing the 2002 NSR rule revisions, the EPA explained that owners or operators "will not be required to make the projected actual emissions projection through a permitting action" and

[11] The term "netting" refers to determining the net emissions increase. The net emissions increase is calculated as the sum of the projected emissions increase, calculated pursuant to 40 C.F.R. § 52.21(a)(2)(iv), and any other increases and decreases in actual emissions at the major stationary source that are contemporaneous and otherwise creditable. *See* 40 C.F.R. § 52.21(b)(3).

that it "also believe[d] that it is not necessary to make … future projections enforceable in order to adequately enforce the major NSR requirements. The Act provides ample authority to enforce the major NSR requirements if … physical or operational change results in a significant net emissions increase at [a] major stationary source." 68 FR 80204 (December 31, 2002). Moreover, the regulations are clear that owners or operators need not obtain approval of their pre-project NSR applicability analyses from the reviewing authority before construction.[12]

As the EPA explained in 2002, a key objective of the projected actual emissions provisions was to avoid the need for permitting authority review of NSR applicability determinations prior to implementation of a project. The rules instruct the affected source to consider "all relevant information," (as defined in 40 C.F.R. §52.21(b)(41)(ii)) in making an applicability determination. They also include specific instructions as to when and how actual emissions projections must be documented and when post-project emissions monitoring and reporting is required. If an affected source complies with those requirements, it has satisfied the source obligations that are required under our NSR rules.

The NSR rules instruct the source to exclude from a projection those emissions that both could have been accommodated during the baseline period and that are unrelated to the project. Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgement to exclude increases for which the project is not the "predominant cause." 45 Fed. Reg. 32,327 (1992). The NSR rules provide no mechanism for agency review of procedurally compliant emission projections. To infer the existence of such a mechanism would be tantamount to inferring agency authority to require pre-approval of emissions projections. Such an outcome is inconsistent with the text of the EPA rules and with the agency's clearly stated intent in adopting those rules.

Consistent with these regulations, the EPA intends to focus on the fact that it is the obligation of source owners or operators to perform pre-project NSR applicability analyses and document and maintain records of such analyses as required by the regulations. It also intends to focus on the fact that the post-project monitoring, recordkeeping and reporting requirements provide a means to evaluate a source's pre-project conclusion that NSR does not apply and that the NSR applicability procedures make clear that post-project actual emissions can ultimately be used to determine major modification applicability. This is reflected in the following sentence: "Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*b*). In addition, the post-project monitoring and recordkeeping requirements under the "reasonable possibility" rule provisions described previously further confirm the important role that actual post-project emissions data play in determining NSR applicability.

Based on the foregoing, and while further review of these issues by the EPA is pending, the EPA intends to implement and exercise its authority under the NSR provisions to clarify that

[12] With respect to existing electric utility steam generating unit(s), for which submittal of the pre-project record is required before beginning actual construction, the regulations explicitly state: "Nothing in this paragraph … shall be construed to require the owner or operator or such a unit to obtain any determination from the Administrator before beginning actual construction." 40 C.F.R. § 52.21(r)(6)(ii). For all other emissions unit categories, there is no requirement to submit the pre-project applicability record before construction.

when a source owner or operator performs a pre-project NSR applicability analysis in accordance with the calculation procedures in the regulations, and follows the applicable recordkeeping and notification requirements in the regulations, that owner or operator has met the pre-project source obligations of the regulations, unless there is clear error (e.g. the source applies the wrong significance threshold). The EPA does not intend to substitute its judgement for that of the owner or operator by "second guessing" the owner or operator's emissions projections.

Furthermore, when an owner or operator projects that a project will result in an emission increase or a net emissions increase less than the significant emissions rate in accordance with the NSR regulations, the EPA intends to focus on the level of actual emissions during the 5- or 10-year recordkeeping or reporting period after the project for purposes of determining whether to exercise its enforcement discretion and pursue an enforcement action. That is, the EPA does not presently intend to initiate enforcement in such future situations unless post-project actual emissions data indicate that a significant emissions increase or a significant net emissions increase did in fact occur. Although the majority in the first DTE opinion held that the EPA may pursue enforcement of its projection regulation where a source owner or operator has failed to perform a required pre-project applicability analysis or has failed to follow the objective calculation requirements of the regulations regardless of the level of post-project emissions, the court decision does not compel the EPA to pursue enforcement in such situations. The EPA has substantial discretion regarding prosecution of violations of the CAA and the first DTE opinion does not limit the EPA's discretion to consider whether prosecution of other sources is warranted in similar circumstances. Thus, pending further review of these issues by the courts and the EPA, the agency does not intend to pursue new enforcement cases in circumstances such as those presented in the DTE matter.

Finally, the EPA notes that while this memorandum refers to federal NSR regulations at 40 C.F.R. § 52.21, in states with EPA-approved NSR programs, the state and local regulations that the EPA has approved into the SIP are the governing federal law. To be approvable, the NSR requirements in a state plan must be at least as stringent as the federal rule requirements in 40 C.F.R. §§ 51.165 and 51.166 for NNSR and PSD programs, respectively, but may be more stringent at the state's discretion. The implementation of the NSR program is one example of cooperative federalism under the CAA under which the state regulations have primacy once they are approved by the EPA. However, if it is later determined that the NSR program approved into the SIP is deficient, the EPA has the authority under 42 U.S.C. § 7410(k)(5) to call for a state to revise its regulations. In the absence of such a SIP call, it is the EPA-approved state regulations that govern NSR applicability.

cc: Ryan Jackson
Mandy Gunasekara

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Schwab, Justin[Schwab.Justin@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Wehrum, Bill[Wehrum.Bill@epa.gov]
From: Bodine, Susan
Sent: Thur 12/7/2017 5:24:37 PM
Subject: RE: NSR Memo

At a minimum the first two of the three sentences Ex. 5 - Deliberative Process/Attorney Client Privilege

Ex. 5 - Deliberative Proces/Attorney Client Privilege

From: Bodine, Susan
Sent: Thursday, December 7, 2017 12:10 PM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Wehrum, Bill <Wehrum.Bill@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Patrick Traylor (traylor.patrick@epa.gov) <traylor.patrick@epa.gov>
Subject: RE: NSR Memo
Importance: High

Ex. 5 - Deliberative Proces/Attorney Client Privilege

From: Gunasekara, Mandy
Sent: Thursday, December 7, 2017 12:06 PM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: NSR Memo

Attached is final. Circling back on this Ex. 5 - Deliberative Proces/Attorney Client Privilege

Ex. 5 - Deliberative Proces/Attorney Client Privilege

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Bodine, Susan[bodine.susan@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Burke, Marcella[burke.marcella@epa.gov]
From: Schwab, Justin
Sent: Thur 12/7/2017 4:59:59 PM
Subject: NSR memo--talking points--attorney-client
NSR Memo_TPs for press.docx

ATTORNEY CLIENT COMMUNICATIONS

ATTORNEY WORK PRODUCT

The attached talking points Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Bodine, Susan[bodine.susan@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]
From: Schwab, Justin
Sent: Thur 12/7/2017 4:52:54 PM
Subject: NSR memo--general OGC thoughts on legal risk

(Expanding on some of the comments on the draft.)

Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]; Wehrum, Bill[Wehrum.Bill@epa.gov]
Cc: Jackson, Ryan[jackson.ryan@epa.gov]; Wilcox, Jahan[wilcox.jahan@epa.gov]
From: Bowman, Liz
Sent: Thur 12/7/2017 4:45:17 PM
Subject: FW: Heads up -- NSR Memo

It appears that John Millet is "giving heads up" to trade press on the NSR memo Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

From: Millett, John
Sent: Thursday, December 07, 2017 10:29 AM
To: Grantham, Nancy <Grantham.Nancy@epa.gov>
Cc: Jones, Enesta <Jones.Enesta@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Noonan, Jenny <Noonan.Jenny@epa.gov>
Subject: Heads up -- NSR Memo

Hi Nancy – just got a heads up that there's a memo in the works – Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

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John Millett

Director, OAR Communications
~~~~~~~~~~~~~~~~~~

Desk: 202-564-2903

Cell: 202-510-1822

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Traylor, Patrick[traylor.patrick@epa.gov]; Bodine, Susan[bodine.susan@epa.gov]; Burke, Marcella[burke.marcella@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]; Doster, Brian[Doster.Brian@epa.gov]; Williams, Melina[Williams.Melina@epa.gov]
From: Schwab, Justin
Sent: Wed 12/6/2017 10:24:02 PM
Subject: NSR memo - OGC comments
NSR policy memo_draft_2017 12 2 edits + mkw bld jjs.docx

Dear Mandy,

Please find attached a redline with comment bubbles. Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

Please let me know if you have any questions.

Best,

Justin

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Wilcox, Jahan[wilcox.jahan@epa.gov]; Abboud, Michael[abboud.michael@epa.gov]; Hewitt, James[hewitt.james@epa.gov]; Konkus, John[konkus.john@epa.gov]; Daniell, Kelsi[daniell.kelsi@epa.gov]; Block, Molly[block.molly@epa.gov]
From: Bowman, Liz
Sent: Wed 12/6/2017 8:57:30 PM
Subject: RE: NSR Memo

Thanks, Mandy. Please send us whatever you have, so that we can prepare something for tomorrow and figure out the best way to get press interest. I have some ideas that I will float with OPA and we will get back to you with our plan – can you also send me some times you would be available tomorrow for background calls?

From: Gunasekara, Mandy
Sent: Wednesday, December 6, 2017 3:50 PM
To: Bowman, Liz <Bowman.Liz@epa.gov>
Subject: NSR Memo

Ex. 5 - Deliberative Process

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]; Schwab, Justin[Schwab.Justin@epa.gov]
Cc: Bodine, Susan[bodine.susan@epa.gov]
From: Traylor, Patrick
Sent: Tue 10/17/2017 2:31:31 PM
Subject: DTE Brief
2017-10-10_DTE Energy Opposition (10-12-2017 LS-PDT edits).docx

Mandy and Justin:

Please find attached OECA's redlines to the brief. Ex. 5 - Deliberative Process/Attorney Client Privilege

Ex. 5 - Deliberative Process & Attorney Client

I have some limited availability this afternoon to discuss this (3:30-5:00 (EDT)).

Patrick

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

(202) 809-8796 (cell)

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
From: Simmons, Daniel
Sent: Thur 9/28/2017 9:03:52 PM
Subject: RE: NSR

By the way, for future reference my direct dial is Ex. 6 - Personal Privacy.

From: Gunasekara, Mandy [mailto:Gunasekara.Mandy@epa.gov]
Sent: Thursday, September 28, 2017 4:44 PM
To: Simmons, Daniel <Daniel.Simmons@ee.doe.gov>; Maddox, Mark <MRMaddox@hq.doe.gov>
Subject: RE: NSR

Dan, thank you for the connection. Mark, I'm happy to chat. I'm not always at my desk so my work cell is best: Ex. 6 - Personal Privacy

Best,

Mandy

Mandy M. Gunasekara

Senior Policy Advisor for Office of Air and Radiation

Office of the Administrator

US Environmental Protection Agency

From: Simmons, Daniel [mailto:Daniel.Simmons@ee.doe.gov]
Sent: Wednesday, September 27, 2017 9:35 AM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Maddox, Mark <MRMaddox@hq.doe.gov>
Subject: NSR

Mark,

Mandy at EPA is the point policy person on NSR. Her phone number is Ex. 6 - Personal Privacy

Mandy,

Mark is the Acting Assistant Secretary in the Office of Fossil Energy. He wants to chat sometime about NSR.

Thanks,

Daniel Simmons

Acting Assistant Secretary

Office of Energy Efficiency and Renewable Energy

U.S. Department of Energy

(202) 586-9220 | daniel.simmons@ee.doe.gov

Scheduler: caitlin.davis@ee.doe.gov

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Schwab, Justin[Schwab.Justin@epa.gov]; Bodine, Susan[bodine.susan@epa.gov]
From: Traylor, Patrick
Sent: Mon 12/4/2017 5:47:19 PM
Subject: RE: NSR Memo

Mandy:

Susan and I are available to meet with you and Justin at 1:00 p.m. today. I've sent you a calendar invite.

Patrick

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

(202) 809-8796 (cell)

From: Gunasekara, Mandy
Sent: Monday, December 4, 2017 9:03 AM
To: Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Jackson, Ryan <jackson.ryan@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>; Schwab, Justin <Schwab.Justin@epa.gov>
Subject: NSR Memo

Good Morning –

Attached is the latest version of the NSR Memo pertaining to the issues at issue in the DTE case.

Ex. 5 - Deliberative Process

Thanks,

Mandy

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

From: Traylor, Patrick
Location: WJCS-3216
Importance: Normal
Subject: NSR Memorandum Discussion
Start Date/Time: Mon 12/4/2017 6:00:00 PM
End Date/Time: Mon 12/4/2017 7:00:00 PM

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
From: Lewis, Josh
Sent: Mon 12/4/2017 3:49:04 PM
Subject: RE: NSR Memo

Thanks

From: Gunasekara, Mandy
Sent: Monday, December 04, 2017 10:19 AM
To: Lewis, Josh <Lewis.Josh@epa.gov>
Subject: Fwd: NSR Memo

FYI

Sent from my iPhone

Begin forwarded message:

From: "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Date: December 4, 2017 at 9:02:53 AM EST
To: "Bodine, Susan" <bodine.susan@epa.gov>, "Patrick Traylor (traylor.patrick@epa.gov)" <traylor.patrick@epa.gov>
Cc: "Jackson, Ryan" <jackson.ryan@epa.gov>, "Dravis, Samantha" <dravis.samantha@epa.gov>, "Schwab, Justin" <schwab.justin@epa.gov>
Subject: NSR Memo

Good Morning –

Attached is the latest version of the NSR Memo pertaining to the issues at issue in the DTE

Ex. 5 - Deliberative Process

Thanks,

Mandy

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Koerber, Mike[Koerber.Mike@epa.gov]
From: Lewis, Josh
Sent: Fri 12/8/2017 4:33:43 PM
Subject: RE: NSR

Do you know if Ryan is planning to send to the RAs today? OAQPS wants to send to the Air Division Directors, but didn't want to get ahead of anything Ryan was planning to do

Josh

-----Original Message-----
From: Gunasekara, Mandy
Sent: Thursday, December 07, 2017 6:27 PM
To: Lewis, Josh <Lewis.Josh@epa.gov>; Millett, John <Millett.John@epa.gov>; DeLuca, Isabel <DeLuca.Isabel@epa.gov>; White, Elizabeth <white.elizabeth@epa.gov>; Hope, Brian <Hope.Brian@epa.gov>
Subject: NSR

Thanks for your help today in getting the memo over the finish line!

Sent from my iPhone

To: Wehrum, Bill[Wehrum.Bill@epa.gov]; Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Traylor, Patrick[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Fri 12/8/2017 3:46:19 PM
Subject: NSR memo

I spoke to SP about Ex. 5 - Deliberative Process/Attorney Client He suggested Ex. 5 - Deliberative Process/Attorney Client Ex. 5 - Deliberative Process/Attorney Client

My recommendation remains **Ex. 5 - Deliberative Process/Attorney Client**

From: Loving, Shanita
Location: WJC-N 5400 + Video with OAQPS + 1 Ex. 6 - Personal Privacy Participant Code: Ex. 6 - Personal Privacy
Importance: Normal
Subject: NSR Improvement
Start Date/Time: Thur 11/30/2017 4:00:00 PM
End Date/Time: Thur 11/30/2017 4:45:00 PM
Wehrum Meeting Request_NSR Improvement.docx

To: Wehrum, Bill; Harlow, David; Gunasekara, Mandy; Lewis, Josh; Page, Steve; Koerber, Mike; Harnett, Bill; Wood, Anna; Kornylak, Vera; Santiago, Juan; Wayland, Richard; Dunham, Sarah; Harvey, Reid; Krieger, Jackie; Vetter, Cheryl; Rao, Raj
Cc: Alston, Lala; Johnson, Yvonnew; Long, Pam